LIBRARY
SUPREME COURT, U. S.
FILED
JUL 17 1978

IN THE

Supreme Court of the United States

TERM 1978

NO. 78-1547

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

LILA YOUNG
HAROLD H. BERTRAM
LAWRENCE McTURNAN
BERTRAM, MARTIN & McTURNAN
2430 Indiana National Bank Tower
One Indiana Square
Indianapolis, Indiana 46204
(317) 639-4294
Attorneys for Petitioners.

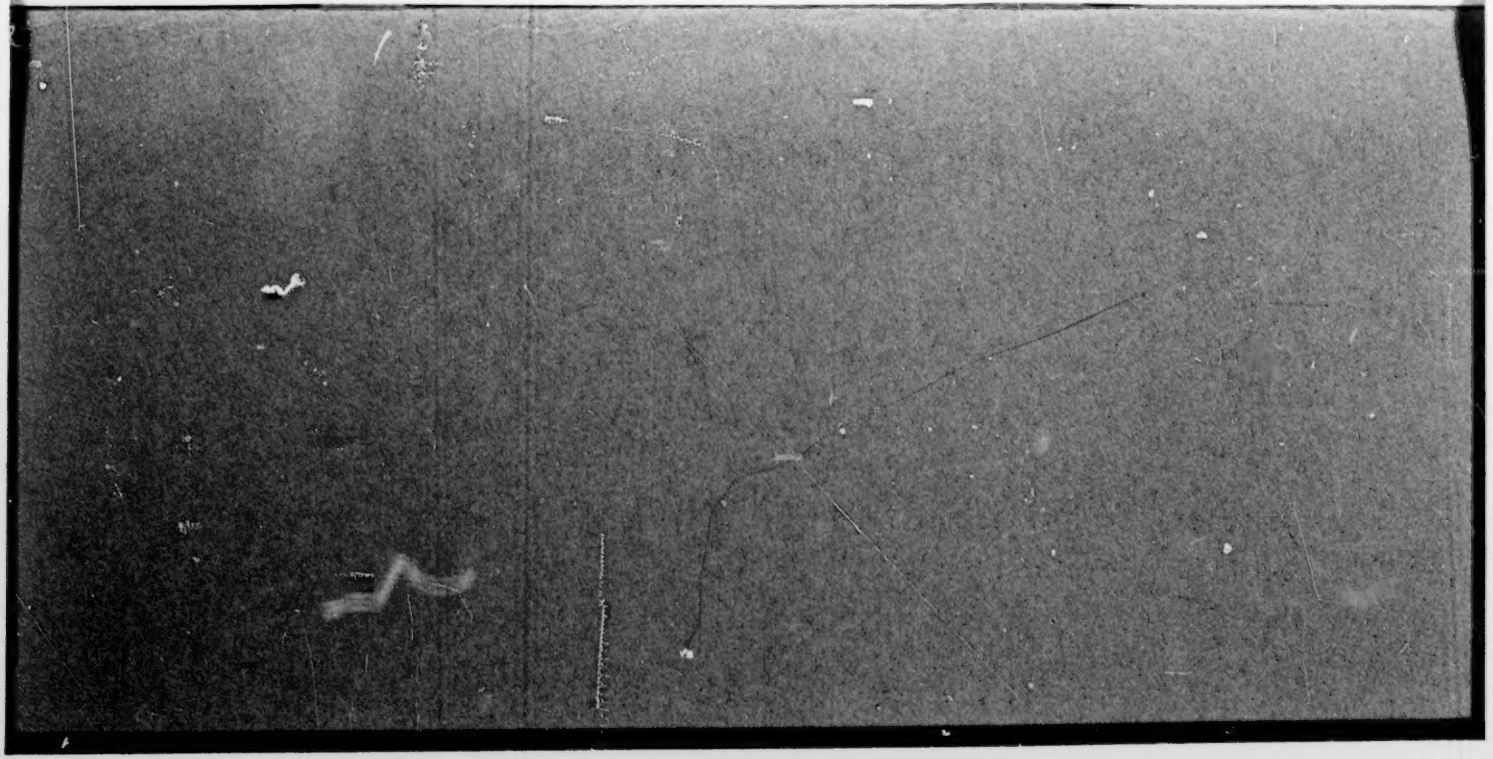

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented for Review	3
Statement of the Case	4
Summary of Argument	8
Question One	8
Question Two	11
Question Three	15
Question Four	17
Question Five	18
Argument	19
Question One	19
A. Vagueness and Overbreadth Standards (Criminal Statutes v. Board Regulations	19
B. Community at-large v. Elementary and Secondary Schools	23
C. Adults v. Minors	25
Question Two (Validity of Subsequent Restraint Restraint Rules)	28
A. Sales and Solicitations	28
1. Board may prohibit use of school property for non-school purposes	30
2. Rule upheld if reasonable basis for it	31
3. Reasons for rule; similar rules upheld by other courts	32
4. Lower courts' cases do not justify invalidation of rules	34
a. District Court cases	34
1. *Sullivan*	34
2. *Riseman*	36
b. Court of Appeals case *U.S.* v. *O'Brien*	36

Page

5. Rule is not void for vagueness 40
B. Disruption Rule 11.05, Section 1.1.1.3 41
Court's injunction is overbroad 47
C. Student distribution of anonymous literature or literature not written by a student or school employee 48
1. Rule 11.05, section 1.1.1.4 (not written by students or school employees) 48
2. Rule 11.05, section 1.3.1.6 (anonymous literature) 51
a. Cases relevant to 1.3.1.6 53
D. Distribution during class hours 54
Question Three 56
A. *CCC* is obscene as to minors 57
B. School can discipline students who use or distribute filthy, vulgar language 64
Question Four (Prior Restraint) 70
Specific Substantive Guidelines 75
Question Five 79
Conclusion 85

TABLE OF AUTHORITIES

Cases

Page

Adderley v. *Florida* (1966), 385 U.S. 39, 17 L.Ed. 2d 149 ..... 12, 30

Antonelli v. *Hammond* (D. Mass., 1970), 308 F. Supp. 1329 49

Baker v. *Downey City Board of Education* (C.D. Cal., 1969), 307 F. Supp. 517 ..... 25, 69

Bantam Books, Inc. v. *Sullivan* (1963), 372 U.S. 58 71

Bender v. *Streabich* (1897), 182 Pa. 251, 37 A. 853 30

Blackwell v. *Issaquena County Board of Education* (5th Cir., 1966), 363 F. 2d 749 31

Blackwell v. *Vance Trucking Co.* (E.D.S.C., 1956), 139 F. Supp. 103 82

Brandenburg v. *Ohio* (1969), 395 U.S. 444 79

Breard v. *Alexandria* (1951), 341 U.S. 622, 95 L.Ed. 1233 33

Burnside v. *Byars* (5th Cir., 1966), 363 F. 2d 744 31

Chaplinsky v. *New Hampshire* (1942), 315 U.S. 568 ..... 48, 68, 71

Cincinnati v. *Walton* (Ohio Mun., 1957), 145 N.E. 2d 407 60

Cloak v. *Cody* (N.D. N.C., 1971), 326 F. Supp. 391 ..... 32, 37, 40

Crossen v. *Fatsi* (D. Conn., 1970), 309 F. Supp. 114 25

Eisner v. *Stamford Board of Education* (2nd Cir., 1971), 440 F. 2d 803 ..... 5, 44, 45, 53, 71, 72

Esteban v. *Central Missouri State College* (W.D. Mo., 1968), 290 F. Supp. 622 21

Esteban v. *Central Missouri State College* (8th Cir., 1969), 415 F. 2d 1077, *cert. den.* (1970), 398 U.S. 965 ..... 20, 21

Flying Eagle Publications, Inc. v. *United States* (1st Cir., 1961), 285 F. 2d 307 60

Fujishima v. *Board of Education* (7th Cir., 1972), 460 F. 2d 1355 ..... 19, 42, 70, 74

Ginsberg v. *New York* (1968), 390 U.S. 629, 20 L.Ed. 2d 195 ..... 16, 25, 26, 57, 58

Goldberg v. *Regents of University of California* (1967), 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 69

Graham v. *Houston Independent School District* (S.D. Tex., 1970), 335 F. Supp. 1164, *aff'd.* (5th Cir., 1970), 433 F. 2d 355 31

Page

Grayned v. *City of Rockford* (1972), 408 U.S. 104 .....55, 56
Healy v. *James* (1972), 408 U.S. 169, 33 L.Ed. 2d 266 21, 22, 25
Jones v. *Snead* (8th Cir., 1970), 431 F. 2d 1115 20
Jones v. *State Board of Education* (M.D. Tenn., 1968), 279 F. Supp. 190, *aff'd.* (6th Cir.), 407 F. 2d 834, *cert. dism'd. as improvidently granted*, 397 U.S. 31, *reh. den.* 397 U.S. 1018 20
Katz v. *McAulay* (2d Cir., 1971), 438 F. 2d 1058, *cert. den*, 405 U.S. 933 .....29, 33, 37, 40
Kois v. *Wisconsin* (1972), 408 U.S. 229 .....61, 62
Lewis Publishing Co. v. *Morgan* (1913), 229 U.S. 288 53
Matter of Schiener, 11 Ed. Dept. Rep. —, N.Y. Comm. Dec. No. 8467 53
Memoirs v. *Massachusetts* (1966), 383 U.S. 413 .....16, 58
Merryman v. *School District No. 16* (1931), 43 Wyo. 376, 5 P. 2d 267 30
Miller v. *California* (1973), 413 U.S. 15 .....16, 58
Near v. *Minnesota* (1931), 283 U.S. 697, 75 L.Ed. 1357..48, 71
Norton v. *Discipline Committee of East Tennessee State University* (6th Cir. 1969), 419 F. 2d 195, *cert. den.* 399 U.S. 906 (1970) 75, 76
Papish v. *Board of Curators of University of Missouri* (1973), 410 U.S. 667, 35 L.Ed. 2d 618 19
Parker v. *Levy*, No. 73-206, June 19, 1974 ....22, 24, 27, 45, 46
People v. *Hamilton News Co.* (1963), 38 Misc. 2d 1004, 239 N.Y.S. 2d 631 60
People v. *Kirkpatrick* (1970), 64 Misc. 2d 1055, 316 N.Y.S. 2d 37, *aff'd* 329 N.Y.S. 2d 769, *aff'd* 343 N.Y.S. 2d 70 60
People v. *Pocket Books, Inc.* (1963), 38 Misc. 2d 1004, 239 N.Y.S. 2d 631 60
People v. *Richmond County News, Inc.* (1961), 216 N.Y. 2d 578 61
People v. *Wasserman* (1970), 27 Mich. App. 16, 183 N.W. 2d 313 60
Police Department of Chicago v. *Mosley* (1972), 408 U.S. 92, 33 L.Ed. 2d 212 .....49, 50
Press v. *Pasadena Independent School District* (S.D. Tex., 1971), 326 F. Supp. 550 20

Page

Prince v. *Massachusetts* (1943), 321 U.S. 158, 88 L.Ed. 645 58
R. v. *Anderson, et al.* (1971), 3 All E. R. 1152 ..... 59, 60
Riseman v. *School Committee of City of Quincy* (1st Cir., 1971), 439 F. 2d 148 36
Roberts v. *Ohio Casualty Insurance Co.* (5th Cir., 1958), 256 F. 2d 35 ..... 18, 80, 81, 82, 83
Rutland v. *Sikes* (E.D. S.C., 1962), 203 F. Supp. 276 82
Scherr v. *Municipal Court for Berkeley-Albany Judicial District* (1971), 15 Cal. App. 3d 930, 93 Cal. Rptr. 556.. 61
Scoville v. *Board of Education of Joliet Twp. H.S. District 204* (7th Cir., 1970), 425 F. 2d 10 ..... 19, 45
Shanley v. *Northeast Independent School District* (5th Cir., 1972), 462 F. 2d 960 ..... 23, 73, 74
Sill v. *Pennsylvania State University* (M.D. Pa., 1970), 318 F. Supp. 608, *aff'd* 440 F. 2d 1351 45
Sill v. *Pennsylvania State University* (3rd Cir., 1972), 462 F. 2d 463 20
Speake v. *Graham* (Miss., 1970), 317 F. Supp. 1253, *aff'd* 440 F. 2d 1351 20
Stacey v. *Williams* (N.D. Miss., 1969), 306 F. Supp. 963.. 30
State v. *Kois* (1971), 51 Wis. 2d 668, 188 N.W. 2d 467 61
Sullivan v. *Houston Independent School District* (S.D. Tex., 1971), 333 F. Supp. 1149 ..... 34, 35
Sullivan v. *Houston Independent School District* (vacated 5th Cir., 1973), 475 F. 2d 1071 ..... 35, 53
Sword v. *Fox* (4th Cir., 1971), 446 F. 2d 1091 20
Talley v. *California* (1960), 362 U.S. 60, 4 L.Ed. 2d 559 ..... 53, 54
Tinker v. *Des Moines Independent School District* (1969) 393 U.S. 503, 21 L.Ed. 2d 731 ..... 10, 13, 15, 19, 24, 31, 39, 40, 45, 47, 56, 72, 76, 77, 78
Till v. *Hartford Accident and Indemnity Co.* (10th Cir., 1941), 124 F. 2d 405 83
Tyre v. *Krug* (1914), 159 Wis. 39, 149 N.W. 718, *overruled on other grounds* 300 N.W. 225 30
United States v. *Harriss* (1954), 347 U.S. 612, 98 L.Ed. 989 ..... 53, 54
U. S. v. *National Dairy Corp.* (1963), 372 U.S. 29 44
U. S. v. *O'Brien* (1968), 391 U.S. 367, 20 L.Ed. 2d 672, *reh. den.* 393 U.S. 900 ..... 12, 37, 38, 39

Page

U. S. v. *Petrillo* (1947), 332 U.S. 1, 91 L.Ed. 1877 44
Varney v. *Warehime* (6th Cir., 1945), 147 F. 2d 238, *cert. den.* 325 U.S. 882 41
Westcott v. *United States Fidelity and Guaranty Co.* (4th Cir., 1946), 158 F. 2d 20 83
Wood v. *Alamo Heights Independent School District* (D.W. Tex., 1970), 308 F. Supp. 551, *aff'd* 433 F. 2d 355 ..... 13, 31
Younger v. *Harris* (1971), 401 U.S. 37; 27 L.Ed. 2d 669.... 46
Zaro v. *Strauss* (5th Cir., 1948), 167 F. 2d 218 84

CONSTITUTIONAL PROVISIONS AND STATUTES

	Page
Constitution of the United States, First Amendment	2
Constitution of the United States, Fourteenth Amendment	2
Federal Rules of Civil Procedure, 11A	67
Federal Rules of Civil Procedure, 17(c)	2, 6, 18, 80-84
Federal Rules of Civil Procedure, 55(b)(2)	83
Public Law 162, Burns' Indiana Stat. Anno., Section 28-5358 *et seq.*	22, 47
Rules of the United States Supreme Court 40(5)	68

OTHER AUTHORITIES

28 C.J. 1058	82
General Order of Judicial Standards of Procedure and Substance in Review of Student Discipline (W.D. Mo., 1968), 45 F.R.D. 133	21

IN THE

Supreme Court of the United States

TERM 1973

NO. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, filed December 14, 1973, 490 F.2d 601, is reprinted at App. Pet. Cert. 16-31. The October 19, 1972, opinion of the United States District Court for the Southern District of Indiana, 349 F.Supp. 605, is reprinted at App. Pet. Cert. 5-15. The Findings of Fact and Conclusions of Law of the District Court is reprinted at App. Pet. Cert. 1-4.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1973. The petition for writ of certiorari was

filed on March 5, 1974, and was granted June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Rule 17(c) of the Federal Rules of Civil Procedure provides:

> "Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

The first amendment of Board Rule 11.05 (Prior Review with Safeguards) is reprinted at App. 17-20. The second

amendment of the Board Rules (Subsequent Review) is reprinted at App. 22-26.

QUESTIONS PRESENTED FOR REVIEW

1. In a court's consideration of the extent of constitutional (First and Fourteenth Amendments) restrictions upon the power of a school board to adopt rules governing student conduct in elementary and secondary schools:

a. Do the identical constitutional standards and tests for vagueness and overbreadth which are applicable to criminal statutes also apply to rules adopted by a school board which subject students to disciplinary measures for certain activities in school?

b. May conduct or language of minor students, not regulated in the community at-large, be constitutionally regulated within elementary and secondary schools?

c. Is it constitutionally permissible for school authorities to impose greater restrictions on minors than the state could constitutionally impose on adults without violating the First Amendment?

2. Does the United States Constitution (First and Fourteenth Amendments) prohibit a school board from adopting rules concerning the distribution of literature by students in its elementary and secondary schools which subject students to disciplinary measures for the following activities?

a. Solicitation of funds or sales of literature and/or other products to students within elementary and secondary schools;

b. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

c. Student distribution of anonymous literature or literature which is not written by a student or school employee; and

d. Distribution of literature by students in schools while classes are being conducted in the school in which the distribution is to be made.

3. Are words found throughout a student newspaper, such as "f - - -, eat shit," awarding points for the number of "freak girls screwed," and a cartoon picturing the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," obscene as to minors and can school authorities punish students for the use of such language in elementary and secondary schools, even if such language is held to be filthy, vulgar and indecent, but not legally obscene as to minors?

4. Does the United States Constitution prevent a school board from adopting reasonable rules which would require prior approval by school authorities of literature before its distribution in elementary and secondary schools?

5. Did the Court err in holding that Rule 17(c) of the Federal Rules of Civil Procedure requiring the appointment of an appropriate representative for infants in litigation did not apply where a constitutional question was presented?

STATEMENT OF THE CASE

The jurisdiction of the United States District Court was invoked pursuant to 42 U.S.C., Section 1983, and 28 U.S.C., Sections 1343, 2201 and 2202.

On June 1, 1972, Plaintiffs, high school students in the Indianapolis Public Schools, filed a class action for declaratory and injunctive relief, and for compensatory and punitive damages in the United States District Court for the Southern District of Indiana, the Honorable William E. Steckler, presiding trial judge. The Defendants in said cause were the Board of School Commissioners of the City

of Indianapolis, Indiana, and its individual members (hereinafter referred to as the Board) and the Superintendent and Administrative Assistant of the Indianapolis Public Schools. Plaintiff students sought an injunction against said Defendants, enjoining them from prohibiting distribution of the *Corn Cob Curtain*, an unofficial student newspaper, in the Indianapolis Public Schools. The students also sought a declaratory judgment that Board Rules 11.05 and 11.06 violated their constitutional rights (First and Fourteenth Amendments). These Rules, which required the Superintendent's prior approval before sales or solicitations or the distribution of literature would be permitted in the schools, were declared unconstitutional by the District Court after an evidentiary hearing on August 24-25, 1972. The Court on August 24, 1972, also denied Defendants' petition for appointment of guardian ad litem or next friend for Plaintiffs and all members of the class they purport to represent.

In September, 1972, pursuant to the Court's order (App. 1-2) the Board amended its original Rules (reprinted App. 17-20). Although amended Rule 11.05 still required prior review of student literature, procedural and substantive safeguards and guidelines were added as were suggested by the Second Circuit in *Eisner v. Stamford Board of Education* (2d Cir., 1971), 440 F.2d 803. However, due to the Court's belief that any requirement of prior approval of student literature was unconstitutional and its order of September 29, 1972, directing the Board to submit additional and/or supplemental guidelines regarding the sale and distribution of student publications (App. 2), the Board again amended Rule 11.05 to remove the requirement of prior review of student literature. The complete text of this final amendment is found in App. 22-26.

On October 19, 1972, the Court entered a permanent injunction against the Defendants, setting out certain conditions for Board rules and declared amended Rule 11.06

and five sections of amended Rule 11.05 unconstitutional. On November 9, 1972, Defendants filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit from the judgment and order of October 19, 1972. The Board requested that the Court of Appeals hold that the first amendment of Rule 11.05 (prior approval with safeguards) and the second amendment of Rule 11.05 and Rule 11.06 (subsequent restraints) were constitutionally permissible and that the Court find the foul language in the *Corn Cob Curtain* obscene as to minors or that minor students could be disciplined for the use of such language in school even if it was not legally obscene as to minors.

In addition, the Court of Appeals was requested to reverse the District Court's decision due to its failure to follow Rule 17(c) of the Federal Rules of Civil Procedure, and to vacate part of the injunction for overbreadth and declare it invalid to the extent that it prohibits review of student literature prior to its distribution in school. Although the Court of Appeals failed to mention these last two issues, it affirmed the District Court's judgment and injunction in all respects, Judge Christensen dissenting in part.

On March 5, 1974, the Board filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and on June 3, 1974, this Court granted the writ.

After the distribution both on and off school property of a few issues (and some 200 copies) of the *Corn Cob Curtain* (hereafter sometimes referred to as *CCC*), the students were informed that they could not sell the *CCC* in the Indianapolis schools because of its obscene, defamatory, abusive, filthy and indecent content, and its disruptive effect on the learning process. School officials objected to the use of language such as "eat shit," and "f - - -," an obscene cartoon depicting the principal sitting on a toilet

in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," and false charges of racial discrimination against a coach. (App. 53-63)

The testimony of the Superintendent and affidavits from all principals in Indianapolis high schools and over 200 parents in the school community were offered and admitted to prove that the *CCC* appealed to the prurient, shameful or morbid interest of minors, was patently offensive to prevailing standards in the community with respect to what is suitable material for minors and utterly without redeeming social importance for minors. (App. 63-64) There were no counter affidavits. Plaintiffs testified that none of them had written any of the material objected to; that it was written by anonymous persons and sent to a post office box. (App. 32, 40) The students also admitted that the use of such four-letter words was improper, upsetting, and embarrassing but that they would be printed in the *CCC* as is, with absolutely no editing. (App. 32, 33, 38, 42) Furthermore, it was the policy of the *CCC* never to edit material received, even from unknown sources and to protect the names of its authors. (App. 28, 38)

There was also evidence that the Superintendent stopped the distribution of the *CCC* because he had reasonable cause to believe that its distribution would seriously disrupt the learning process and cause a rather considerable disturbance. (App. 44-47) Dr. Kalp also testified that especially in view of the unrest and unstable situation at Tech High School and some of the other schools, it does not take something very serious or significant to set the children off in disruptions and confrontations (App. 44-45); that the cartoon depicting a student putting a bomb in the toilet to blow up the school and principal might incite some child to use it to support their own actions and misconduct. (App. 47)

The Superintendent pointed out that other materials such as a Ku Klux Klan publication (Defendants' Exhibit D) were not given approval because they would cause disruptions by students. (App. 44) The decision not to permit the *CCC* to be distributed had to take into consideration that unrest and disturbances had occurred with alarming frequency at various high schools. (App. 12-13, 44) Dr. Kalp's apprehension and forecast of disruption was also due to the fact that the *CCC* is completely unedited; receives and prints anonymous articles from unknown sources and the presence of emotionally disturbed children in the Indianapolis schools. (App. 45-46) It was also the policy of the *CCC* to protect the names of its authors. (Complaint, Exhibit A, p. 2)

Dr. Kalp further testified that salesmen frequently request permission to go into the schools to sell items to the faculty and students and that this is a problem. He said it was absolutely necessary for the continuing function of the schools to limit sales and solicitations in the schools. (App. 43)

The affidavit of Dr. Kalp which was never contradicted states the justification for prohibiting the defamatory, obscene, indecent language and cartoons found throughout the *CCC*. This affidavit presents a fine summary of some of the basic reasons for the Board Rules in question and is reprinted at App. 11-16.

SUMMARY OF ARGUMENT

Question One

We are concerned in this case with the constitutional limitations on the power and discretion of a school board to regulate student conduct and press in elementary and secondary schools which would impede, obstruct or threaten the proper functioning of the school and the achievement of valid educational goals.

Because freedom of speech is one of our most fundamental rights and since criminal punishment is one of government's most awesome and dangerous powers, the power of government to take away a person's liberty and property for his speech and conduct should be carefully restricted within easily identifiable boundaries. Thus we find few limits placed on expression in the community-at-large. However, the lower courts' "insistence on equating, for constitutional purposes, the authority of the state to criminally punish with its authority to exercise even a modicum of control over the [elementary and secondary schools] which it operates, serves neither the Constitution nor public education well." (35 L.Ed.2d 626) Elementary and secondary schools, their purpose, environment and operation differ fundamentally with that of the community at-large, and Board rules are not criminal statutes and do not impose any criminal sanctions whatsoever.

The Court of Appeals for the Seventh Circuit is probably the only court which assumes that the identical constitutional standards for vagueness and overbreadth which are applicable to criminal statutes must also apply to rules adopted by a school board to regulate student behavior. Every rule it examined was declared void on its face for overbreadth. The Court's facial approach, if sustained by this Court, will have a disastrous effect upon the administration of public schools in this country. If any student is disciplined for flagrant violation of a Board rule or wishes to challenge a Board rule, then under the Court's method of review of the regulation, if the student or Court could suggest hypothetical impermissible applications of the rule, it would be declared void on its face and the student could escape any punishment even if his own conduct was not privileged or protected. By this method of review, a judiciary which lacks expertise and training in the problems of operating public schools may abolish virtually any Board rule it deems unwise and thus preclude the exercise

of prudent judgment by those knowledgeable and experienced in public school administration.

It is submitted that there is little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity in Board regulations, particularly in view of the fact that school authorities impose no criminal penalties and have inherent power to maintain order and discipline students in school. Since children can be lawfully disciplined for varieties of misbehavior so numerous as to defy listing, conduct codes are preferably expressed in general terms.

It seems reasonable that the constitutional limits on student expression in the schoolhouse may be different from those in the community at-large, because there are different elements in balancing the private and public interests involved. The grade or high school environment is unique due to its physically confining nature, the immaturity of its inhabitants, their compulsory attendance and the special demands and needs of the educational purpose. A schoolhouse is not public in the same sense as streets and parks. It also cannot be compared to a university which is more like a town and is comprised of adults who are presumably there by choice.

This Court in *Tinker* recognized that students' First Amendment rights should be applied in light of the special characteristics of the school environment. The circumstances of the place and purpose of the regulation, the fact that the students are minors who constitutionally may be subjected to greater restrictions than adults, and the fact that no criminal sanctions are to be imposed are all crucial factors to be considered by this Court in determining whether the Board rules in question should be upheld as reasonable and necessary to achieve vital educational goals.

Thus the Court erred in basing its decision on three erroneous assumptions. It erroneously assumed that Board

regulations should be tested by the same strict standards and tests for overbreadth and vagueness which are applicable to criminal statutes. Second, it erroneously assumed that if the conduct or language of minor students could not be regulated in the general community, it could not constitutionally be regulated in an elementary or secondary school. Third, it erroneously assumed that the power of school authorities to control the press related activities of minors does not reach beyond the scope of state authority over adults.

Question Two

This question concerns the constitutional validity of six Board Rules regulating the distribution of literature by students in elementary and secondary schools which the Court held facially unconstitutional for overbreadth and/or vagueness. These Rules permit no predistribution review or censorship of student literature but subject students to disciplinary measures ranging from a reprimand to a limited expulsion (as a last resort) for certain activities in school.

These Board regulations prohibit the following activities by students with the Indianapolis public schools (both elementary and secondary schools):

A. Solicitation of funds or sales of literature and/or other products (2 rules);

B. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

C. Student distribution of anonymous literature or literature which is not written by students or school employees (2 rules);

D. Distribution of literature in school while classes are being conducted.

The Supreme Court recently set out a four-pronged test for determining if a criminal statute was overbroad. *United States v. O'Brien* (1968), 391 U.S. 367. A criminal statute is not overbroad and is constitutionally justified if

(1) "it is within the constitutional power of government;

(2) it furthers an important or substantial governmental interest;

(3) the governmental interest is unrelated to the suppression of free expression; and

(4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. at 377)

It is submitted that these elements, particularly 3 and 4 need not be as strictly applied to a school board regulation due to the fundamental differences between the school society and general society and the fact that the Board regulations govern conduct of minors and impose no criminal penalties. Nevertheless it is clear that the six Board Rules meet these four requirements.

(1) They are all within the constitutional power of the School Board. A long line of decisions uphold the power of a school board to prohibit the use of school property for non-school purposes since "the state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida* (1966), 385 U.S. 39, 47. Thus the Board should not be *required* to permit its schools to be used for non-school purposes such as sales and solicitations or distribution of non-school literature written by outsiders who seek to use the school as their platform.

The Board not only has constitutional power to regulate the use of property under its control but also has an inherent power to control student conduct in its schools. It has the right and duty not only to protect students in its

charge but to provide an academic atmosphere so that students may learn. It has the power to regulate and prohibit any behavior which materially impedes or obstructs the accomplishment of its educational mission.

(2) All the Rules in question also further important governmental interests. This Court reaffirmed in *Tinker, infra,* 393 U.S. at 507 that an important governmental interest lies in the implementation of "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." The Board also has a vital interest in maintaining order and discipline in its schools and an academic atmosphere free of distractive influences so that educational objectives may be achieved. Schools also have an interest in protecting the safety and well-being of its students and in identifying students who abuse their freedoms and harm others through the use of fraud, libel and obscenity.

This test basically means that there must be a valid reason for the rule and that it must be reasonably connected to the proper operation of the school. There are many valid substantial reasons for the six Board Rules and they unquestionably further and protect important interests of the Board.

(3) All of these governmental interests are unrelated to the suppression of free expression. None of the Rules place any restrictions upon what students can say or write. They permit absolutely no censorship of the content of student expression. The Rules simply place reasonable regulations on the time, place and manner of distribution, all of which are necessary for the proper operation of the schools.

(4) The incidental restrictions on alleged First Amendment freedoms are no greater than is essential to the furtherance of the governmental interests. To prohibit

students from turning the schoolhouse into a literal marketplace; to prohibit them from delaying or disrupting classwork by forbidding distribution while classes are in session which all are required to attend; to prohibit significant disruptions; to prohibit students from becoming the tools of outsiders who seek to reach a vulnerable captive audience in school; to prohibit anonymity so that those responsible for abuses may be identified; all of these prohibitions are essential to further substantial governmental interests. Because students and teachers cannot easily disassociate themselves from expressions directed towards them on school property, because of the pressures upon children of multiple sales and solicitations, because students are so easily distracted from their tasks and must learn self-restraint, because disciplinary problems in such a populated and physically confining setting seriously sap the educational process and because teachers and administrators have the vital responsibility of compressing a variety of subjects and activities in a relatively confined period of time and space, these Rules are necessary so that vital educational objectives may be achieved. Any incidental restrictions on the exercise of speech or press are no greater than necessary to achieve valid goals, and while they may not be permissible restrictions on adults in the general community, they are constitutionally permissible in grade and high schools.

The four requirements of this test having been met, the Court erred in holding the Board Rules unconstitutional for overbreadth.

Similar Board Rules have been examined and upheld by other Courts. In fact these Rules simply implement what has undoubtedly been the practice of most schools throughout the country. Petitioners know of no other Court which has held similar board rules facially overbroad or too vague.

Every case cited by the lower courts as support are easily distinguishable from the case at bar and do not justify invalidation of these Rules.

It is rather ironic that a Court so concerned with overbreadth by the Board could have failed to comment on the overbreadth of the injunction against the Board. The Board was permanently enjoined from adopting or enforcing any rule which "would subject any covered student to the threat of discipline because of the reaction or response of any other person to written material. . . ." (Pet. App. 14) Yet the principles announced by this Court in *Tinker* clearly would allow school authorities to discipline students who distribute materials which cause reactions such as fights and riots or other disruptions interfering with school work or discipline. This injunction also conflicts with the unassailable power of the State to suppress "fighting words" or words which "have all the effect of force" recognized by the Supreme Court in many cases. Thus it should be vacated.

Question Three

This question is concerned with the extent of the constitutional power of elementary and secondary school officials to prohibit the use and distribution in school of filthy, obscene language contained in the *Corn Cob Curtain* such as "f - - -," "eat shit" and vile cartoons such as are reprinted at App. 56-63. The distribution in school of the *Corn Cob Curtain* was prohibited because it contained obscene, filthy, indecent and defamatory language and cartoons which school officials believed were harmful to minors, and would impede and obstruct substantial educational goals.

The District Court refused to rule on the Board's claim that material contained in the *Corn Cob Curtain* was obscene as to minors, but the Court of Appeals, with one dissent, held that it was not, despite the fact that all the

evidence indicated that it was obscene as to minors under the *Ginsberg-Memoirs* tests.

Although the Supreme Court has stated that the concept of obscenity may vary according to the group to whom the questionable material is directed or from whom it is quarantined and has indicated that material which is not obscene for adults may be obscene as to minors, it has never specifically defined the concept of obscenity to minors.

Surely a definition following the *Miller v. California* standard should be acceptable to this Court. However, the case at bar is not a criminal case and no child is going to be jailed or fined for distributing obscene literature at school. Since one of the basic functions of our schools is to teach children self-discipline and to express themselves properly in acceptable, civil terms, school officials should not be required to prove that filthy language meets all the elements of a criminal test for obscenity in order to discipline students who flaunt rules of basic common sense and decency by using or distributing such gutter language in the schoolhouse.

The Brief discusses ten basic reasons for allowing the Board to prohibit the use and distribution of such filth among minors in its schools, regardless of its label. Parents who have no choice but to send their children to school demand it, expect it and have a right to it. Not only will parents lose respect for a school which permits their children to be exposed to such filth, but children would lose respect for a school which tells children that such language is improper but allows them to freely distribute it in school. Children are harmed by such inconsistencies and are also harmed by being exposed to such language in school.

Such language is inherently distractive and disruptive and is scarcely conducive to maintaining an academic atmosphere and a level of decency necessary for learning

to take place. No person can seriously contend that such language has any proper place in the schoolhouse or that permitting its use in elementary or secondary schools would not materially impair the accomplishment of educational objectives. There is probably not one primary or secondary school in the country that condones or permits children to use such language at school. What possible benefit, value or good could be derived by announcing that millions of minors are now free to fill the schools with obscenities?

Are the Courts to be the only places left where indecent language may be prohibited? Surely the Board has more substantial reasons for prohibiting indecent language in its elementary and secondary schools than this Court has in prohibiting indecency in its courtroom or in briefs.

Question Four

The Board amended its original Rule of prior review by adding procedural and substantive guidelines suggested by other Courts of Appeal. (App. 17-20) Because the District Court told the Board that it would hold the amended Rule unconstitutional and because the Seventh Circuit disapproved of any rule requiring prior approval of student literature even if it provided procedural and substantive safeguards, the Board submitted additional Rules which allowed only subsequent restraints.

The lower courts' assumption that a school board may not require any prior approval of student literature before its distribution in elementary and secondary schools is erroneous and flies in the face of decisions by other Circuits as well as this Court.

There is no logical reason to prevent school authorities from "taking a peek" at student literature prior to its distribution in the schoolhouse. Prior review may even be preferable to subsequent restraints for several reasons. The Board is entitled to take preventive measures to protect the school and its inhabitants from major disruptions,

obscenity and libel. It should not be required to wait until the harm occurs. In addition a requirement of predistribution approval would obviate the necessity for any subsequent restraints which the Court of Appeals finds so onerous.

The Board's amended Rule of prior review provides adequate procedural and substantive safeguards and should be upheld by this Court.

Question Five

Since the Plaintiffs were minors, Rule 17(c) of the Federal Rules of Civil Procedure required the District Court to either appoint a guardian ad litem for them or make such other order as was proper for their protection. The Court chose to do neither, although it was presented with a petition to appoint a guardian ad litem prior to trial. Instead the District Court announced a revolutionary new principle of law—that where a constitutional question as distinguished from money damages is involved, the mandatory requirements of Rule 17(c) do not apply. (App. 26-28) It ignored the fact that the minors were requesting compensatory and punitive damages.

This decision not only reveals the Court's refusal to differentiate between minors and adults even when the Federal Rules so require, but is significant because of the distinct possibility that infant plaintiffs could have reversed the decision had they lost.

The possibility became a reality in *Roberts v. Ohio Casualty Insurance Co.*, (5th Cir., 1958), 256 F.2d 35, which reversed a judgment against some minor children although no one even gave a thought to an appointment of a guardian ad litem until after the judgment was rendered.

The refusal to follow Rule 17(c) is even more remarkable in view of the fact that the Plaintiffs were purporting to represent (in a "class action"), nearly 100,000 other students who were also infants.

ARGUMENT

QUESTION ONE

In a court's consideration of the extent of constitutional (First and Fourteenth Amendments) restrictions upon the power of a school board to adopt rules governing student conduct in elementary and secondary schools:

A. DO THE IDENTICAL CONSTITUTIONAL STANDARDS AND TESTS FOR VAGUENESS AND OVERBREADTH WHICH ARE APPLICABLE TO CRIMINAL STATUTES ALSO APPLY TO RULES ADOPTED BY A SCHOOL BOARD WHICH SUBJECT STUDENTS TO DISCIPLINARY MEASURES FOR CERTAIN ACTIVITIES IN SCHOOLS?

Every board rule examined by the Court of Appeals was held facially unconstitutional either for overbreadth and/or vagueness. It is clear that the Court held the School Board to the same strict constitutional standards for overbreadth and vagueness applicable to a legislature, since virtually every case cited by the Court involved a statute, particularly *criminal* statutes.[1]

Yet the Seventh Circuit is probably the only Circuit which assumes that school board regulations and policies governing student conduct in school must be equated to criminal statutes. Other courts which have considered this question agree that the rules or codes of conduct prescribed for students by educational institutions are *not* required to satisfy the same rigorous standards for vagueness and overbreadth as are criminal statutes. See, *e.g.*,

[1] The only exceptions were two of its own cases: *Scoville v. Board of Education of Joliet Twp. H.S. District 204* (7th Cir., 1970), 425 F.2d 10; *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355; and two cases decided by this Court: *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503; *Papish v. Board of Curators of University of Missouri* (1973), 410 U.S. 667, 35 L.Ed.2d 618.

Sill v. Pennsylvania State University (3rd Cir., 1972), 462 F.2d 463; *Jones v. Snead* (8th Cir., 1970), 431 F.2d 1115; *Sword v. Fox* (4th Cir., 1971), 446 F.2d 1091; *Press v. Pasadena Independent School District* (S.D. Tex., 1971), 326 F.Supp. 550; *Speake v. Graham* (Miss. 1970), 317 F. Supp. 1233, *aff.* 440 F.2d 1351.

Some Circuits have gone a step further and held that the tests for vagueness and overbreadth that apply to ordinary *statutes* should not apply to school regulations. For example, in *Jones v. State Board of Education* (M.D. Tenn., 1968), 279 F.Supp. 190, *aff'd.* (6th Cir.), 407 F.2d 834, *cert. dism'd. as improvidently granted,* 397 U.S. 31, *reh. den.* 397 U.S. 1018, the Court rejected the contentions of university students that regulations under which they were expelled (for distributing literature advocating a student boycott) were unconstitutionally vague. These regulations prohibited "(1) Disrespect for university authority, (2) Any act in violation of city, county, state or federal law; and (3) Any other infractions of standards of conduct that require severe disciplinary actions." (279 F.Supp. at 201) The Court noted that the students were not attacking a state *statute,* but a student *regulation* found in a university handbook and said "University regulations for students because of the very nature of the institution and its goals and purposes, should not be tested by the same requirements of specificity as are state statutes." (279 F.Supp. at 202)

The Eighth Circuit agreed in *Esteban v. Central Missouri State College* (8th Cir., 1969), 415 F.2d 1077, cert. den. (1970), 398 U.S. 965 saying:

> ". . . we see little basically or constitutionally wrong with flexibility and reasonable breadth, rather than meticulous specificity, in college regulations relating to conduct. Certainly these regulations are not to be compared with the criminal statute. They are codes of general conduct which those qualified and experienced in the field have characterized not

> as punishment but as part of the educational process itself and as preferably to be expressed in general rather than in specific terms." (415 F.2d at 1088)

Perhaps the most comprehensive statement on this issue was made in *General Order of Judicial Standards of Procedure and Substance in Review of Student Discipline* (W.D. Mo., 1968), 45 F.R.D. 133, 146, which has been cited with approval by many courts.

The basic reason given by courts for refusing to apply criminal standards and processes to school conduct rules is that criminal law is designed for circumstances and ends unrelated to the academic community. In addition, school authorities have inherent power to maintain order and to discipline students. If courts imposed upon educational institutions the intricate, time-consuming, sophisticated rules, standards, procedures, or safeguards of criminal law, it would frustrate the teaching process and render institutional disciplinary control impotent. *Esteban v. Central Missouri State College* (W.D. Mo., 1968), 290 F. Supp. 622, 629. Furthermore, the reasons for which students may be lawfully disciplined or suspended from school are limited only by the varieties of misbehavior which their ingenuity can devise. They are so numerous as to defy listing and therefore necessitate the use of encompassing words in conduct codes.

A close examination of cases recently decided by this Court provides support for the view that no analogy should be made between criminal statutes and board regulations. In *Healy v. James* (1972), 408 U.S. 169, 33 L.Ed.2d 266, Justice Rehnquist in a concurring opinion noted that:

> "I find the implication clear from the Court's opinion that the constitutional limitations on the government's acting as administrator of a college differ from the limitations on the government's acting as sovereign to enforce its criminal laws. The Court's quotations from Tinker * * * and from Esteban v. Central Missouri State College, 415 F.2d

> 1077, 1089 (CA 8 1969), to the effect that a college 'may expect that its students adhere to generally accepted standards of conduct,' emphasize this fact. * * * Because of these acknowledged distinctions of constitutional dimension based upon the role of the government, I have serious doubt as to whether cases dealing with the imposition of criminal sanctions * * * are properly applicable to this case dealing with the government as college administrator. * * * And there can be a constitutional distinction between the infliction of criminal punishment, on the one hand, and the imposition of milder administrative or disciplinary sanctions, on the other, even though the same First Amendment interest is implicated by each." (408 U.S. at 202-203)

This Court held in *Parker v. Levy*, No. 73-206, June 19, 1974, that the same strict standards for vagueness and overbreadth do not apply to military codes of conduct. While we do not mean to imply that the environment and purpose of the Indianapolis schools should be equated to that of the military, a valid analogy can be made and many of the principles stated in *Parker* can be applied with equal validity to elementary and secondary schools for the same reason—the basic factors differentiating the school society from the community at-large. Proper education, like the military mission, is vital and basic to civilized society and therefore elementary and secondary schools must have wide discretion and broad powers to prescribe and control conduct of children at school.

Unlike the military code in *Parker v. Levy, supra*, which provides penalties of death and substantial penal confinemen., the Board Rules permit only mild disciplinary measures ranging from reprimand or counselling after school to the maximum of expulsion. Expulsion is used only as a last resort and the student is provided *many* protections under an Indiana statute. (Public Law 162, *Burns' Indiana Stat. Anno.*, Sec. 28-5358, *et seq.*) For example, if a student requests an expulsion hearing, he may not be expelled

until he receives a prompt, adversary hearing before a hearing officer not connected to the school; the superintendent must concur in the hearing officer's decision, and the student has the right to prompt review of the decision by the School Board and courts. The maximum length of an expulsion is limited also; for example, a student over 16 may be expelled at maximum for the remainder of the school year. Thus, there is no valid comparison between criminal statutes and the Board Rules. Under the Board Rules, a student may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. Nevertheless, the student is by statute accorded many of the same procedural safeguards as one accused of a crime.

B. MAY CONDUCT OR LANGUAGE OF MINOR STUDENTS, NOT REGULATED IN THE COMMUNITY AT-LARGE, BE CONSTITUTIONALLY REGULATED WITHIN ELEMENTARY AND SECONDARY SCHOOLS?

This question is closely related to Part A and to the general issue of overbreadth. It is not at all unusual to allow the geographical location of the actor to determine the constitutional protection that should be afforded to his or her acts. See, *e.g., Shanley v. Northeast Independent School District* (5th Cir., 1972), 462 F.2d 960, 974. For example, a march down the middle of a street might be protected activity, while a march down the hallway of a building might not.

The contrast between the setting and operation of a grade or high school and the community at-large is well known to everyone, but the significance of these differences cannot be over emphasized. In a high school hundreds or thousands of youngsters of widely differing backgrounds and abilities are brought together for seven hours a day in one building for the purpose of developing their intellectual or vocational capacities, which effort is distasteful to

many and resisted by some. The schoolhouse is not public in the same sense as streets, courthouses and public parks, and students may not use the schools at their whim as a platform for the exercise of free speech. These differences and the unique and special purpose of elementary and secondary schools require a different application of constitutional principles applicable to the general community so that school authorities are permitted to regulate both with greater breadth and with greater flexibility than legislators when prescribing the rules by which minor students shall be governed at school.

This Court, in *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503, 21 L.Ed.2d 731, implicitly recognized the difference when it said that students' First Amendment rights should be applied in light of the special characteristics of the school environment. (393 U.S. at 506)

In *Parker v. Levy, supra,* this Court stated:

> "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." (page 23)

The Board submits that there is also a fundamental difference between the school and the community at-large. Because of factors such as the special need for maintaining order and discipline at schools so that vital educational objectives may be achieved, and the immaturity of the schools' inhabitants, certain restrictions are and must be placed upon the freedom and conduct of students, which might well be intolerable in the university community or

the community at-large. Justice Rehnquist, concurring in *Healy v. James, supra,* stated:

> "The government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens." (408 U.S. at 203)

Keeping these principles in mind, the Board Rules discussed below should be upheld as reasonable Rules which are essential to the proper function of the Indianapolis schools.

C. IS IT CONSTITUTIONALLY PERMISSIBLE FOR SCHOOL AUTHORITIES TO IMPOSE GREATER RESTRICTIONS ON MINORS THAN THE STATE COULD CONSTITUTIONALLY IMPOSE ON ADULTS WITHOUT VIOLATING THE FIRST AMENDMENT?

Most courts, in considering the permissible limits of control over the speech of high school students recognize that "they may be more strictly curtailed in the mode of their expression and in other manners of conduct than college students or adults." *Baker v. Downey City Board of Education* (C.D. Cal., 1969), 307 F.Supp. 517, 527.

In *Crossen v. Fatsi* (D.Conn., 1970), 309 F.Supp. 114, the Court said:

> "Any attempt to compare and equate the constitutional rights of adults . . . on the same plane with that of the adolescent high school teenagers, . . . is like comparing oranges and apples. The compulsory nature of . . . education at the high school level involves added disciplines essential to maintain the purpose and fabric of that relationship, free of disruption, so that educational objectives are most likely to be obtained."

In *Ginsberg v. New York* (1968), 390 U.S. 629, 638, this view was also reaffirmed by this Court which noted:

> ". . . we have recognized that even where there is an invasion of protected liberty 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . .' Prince v. Massachusetts, 321 U.S. 158, 170."

It does not require a vivid imagination to visualize the type of atmosphere and discipline that would prevail in primary and secondary schools if children at school were permitted with impunity to mock and ridicule their teachers and one another, use filthy, profane or obscene language, urge others to disobey their teachers, school rules, or the law, conduct commercial activities, and anonymously write falsehoods, thereby causing a delay of school work, distractions, disruptions, or violence. School authorities throughout the nation have always endeavored to discourage this improper behavior. In fact, the elementary or secondary school is viewed by most as a substitute parent and has the duty to protect minors, set proper examples, and instruct students in the principles of morality, truth and justice.

If the Board Rules are held unconstitutional by this Court, the elementary and secondary schools will not be able to maintain even a basic level of decency, order and discipline necessary to obtain the academic atmosphere essential for learning. Furthermore, since one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of values shared by members of the community—some measure of public regulation of classroom speech is inherent in the very provision of public education.

Thus, the age of the students must be a crucial factor in determining the validity of the Rules in question, particularly since conduct which might go unnoticed and be of little or no influence with college students or adults, may

have a profound effect on discipline and learning in elementary and secondary schools.

To conclude the first question, a paraphrase of *Parker v. Levy, supra,* seems appropriate. Just as the elementary and secondary school students are separated in an atmosphere dramatically different from general society, or even the university society, so school rules exist separate and apart from statutes applicable to society in general. To maintain discipline in an academic atmosphere essential to perform its mission effectively, elementary and secondary schools have developed basic policies and practices which are essential to its vital goals. The schools have always regulated certain conduct and speech of its minor students which are left unregulated in the general community. In elementary and secondary schools, some restrictions exist and are necessary for reasons that have no counterpart in the general community. Vulgar and indecent language, or disrespectful and contemptuous speech, even advocacy of violent change is tolerable in the general community or perhaps even in the university community, for it does not directly affect the capacity of the government to discharge its responsibility unless it both is directed to inciting imminent lawless action and is likely to produce such action. In the elementary and secondary schools, however, other considerations must be weighed. Because the proper operation of the public school system is one of the highest and most fundamental responsibilities of the state, because elementary and secondary schools are filled with vulnerable immature children who are required to attend school to learn, because discipline and an academic atmosphere is essential for learning to take place, because so many children do not have the mental or emotional maturity to control themselves or to conceptualize and make valid judgments, a different application of First Amendment protections is required in elementary and secondary schools. Although these principles were obvi-

ously rejected by the Court of Appeals, they are nevertheless valid principles which should be applied to uphold the Rules in question.

QUESTION TWO

Does the United States Constitution (First and Fourteenth Amendments) prohibit a school board from adopting rules concerning the distribution of literature by students in elementary and secondary schools which subject students to disciplinary measures for the following activities?

A. Solicitation of funds or sales of literature and/or other products to students within elementary and secondary schools;

B. Distribution of literature that is productive of, or likely to produce a significant disruption of the normal educational processes, functions, or purposes of the public schools, or injury to others;

C. Student distribution of anonymous literature or literature which is not written by students or school employees;

D. Distribution of literature by students in school while classes are being conducted in the school in which the distribution is to be made.

This question concerns the validity of the present Board rules (second amendment allowing only subsequent restraints) which the Court of Appeals found unconstitutional for vagueness and/or overbreadth.

A. SALES AND SOLICITATIONS

The present *amended* Board rules on sales and solicitations in the Indianapolis public schools read as follows:

> *Rule 11.06.* "No person, including students and organizations or corporations, other than the school corporation acting through its designated agents, or organizations of parents and teachers or students

whose sole use of funds is for the benefit of the particular school in which they are organized or in attendance, may sell merchandise or material, collect money, or solicit funds or contributions from the students for any cause or commercial activity within any school or on its campus."

Rule 11.05, Section 1.3.1.5. No distributable literature shall be distributed by any student in any school "in immediate exchange for money or any other thing of value (or for an immediate promise of money or any other thing of value), whether the transaction is characterized as a sale of the distributable literature, as a contribution to finance the publication or distribution of the distributable literature, or as any other transaction whereunder money or any other thing of value (or a promise of either) immediately passes to or for the direct or indirect benefit of the student who is distributing the distributable lietrature."

The *original* Rule 11.06 required prior approval of the Superintendent for any sales, collections of money or articles, contests or exhibits in the Indianapolis public schools. Because the District Court believed prior restraints on such activities were constitutionally impermissible and ordered the Board to submit new guidelines (8/29/72), the Board amended the Rule to remove the requirement of prior approval and to prohibit sales and solicitations at school except those for the use of the school. The Board was also aware that if it allowed one person or organization to sell products or solicit funds in the schools, it would be difficult to prohibit others from exercising the same privilege without being charged with discrimination. *Katz* v. *McAulay* (2d Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933.

These amended Rules were then held facially unconstitutional for overbreadth. The Board submits that the amended Rules quoted above are valid and not overbroad for the following reasons:

1. BOARD MAY PROHIBIT USE OF SCHOOL PROPERTY FOR NON-SCHOOL PURPOSES.

"The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley v. Florida* (1966), 385 U.S. 39, 47; 17 L.Ed.2d 149, 159. Since public schools are dedicated to the specialized function of education, they may be utilized solely for that purpose. *Stacy v. Williams* (N.D. Miss., 1969), 306 F.Supp. 963, 969. A school board is clearly under no constitutional duty to allow schools to be used for non-school purposes—particularly commercial activities. In fact, courts formerly held that school property could not be used for *any purpose* not directly related to the instruction of pupils enrolled in school. See, *e.g., Bender v. Streabich* (1897), 182 Pa. 251, 37 A. 853. Later, some courts held that the use of school property for non-school purposes while classes were not in session rested within the sound *discretion* of school authorities. The Court, in *Merryman v. School District No. 16* (1931), 43 Wyo. 376, 5 P.2d 267, held that the school authorities did not exceed their authority or abuse their discretion by permitting school premises to be used while classes were not in session for certain activities, such as school plays, athletic events, dancing and the serving of luncheons.

The general provision of a statute empowering school boards to "adopt such measures as shall promote the good order and public usefulness" of the schools was held not to confer authority on a school board to allow school principals to *sell* school books and supplies to students on school premises at a profit, the Court stating that the statute did not disclose a legislative intent to confer power on school boards to permit school houses to be used for the conduct of private businesses for personal profit. *Tyre v. Krug* (1914), 159 Wis. 39, 149 N.W. 718, overruled on other grounds, 300 N.W. 225.

Thus, the Court of Appeals' decision that the School Board is now constitutionally required to permit its schools to be used for the sale of items for the personal profit of students and/or non-students denies the right of the Board to regulate the use of school property under its control in the face of a long line of decisions holding to the contrary.

2. RULE UPHELD IF REASONABLE BASIS FOR IT.

Courts in their examination of school board rules which regulate student conduct at school basically agree that school authorities should possess considerable leeway in promulgating regulations for the proper conduct of students, and that "courts should uphold them where there is any rational basis for the questioned rule. All that is necessary is a reasonable connection of the rule with the proper operation of the schools." *Graham v. Houston Independent School District* (S.D. Tex., 1970), 335 F.Supp. 1164, at 1167, *aff'd.* (5th Cir., 1970), 433 F.2d 355. See, *e.g., Wood v. Alamo Heights Independent School District* (W. D. Tex., 1970), 308 F.Supp. 551., *aff'd* 433 F.2d 355.

Burnside v. Byars (5th Cir., 1966), 363 F.2d 744, cited with approval by this Court in *Tinker v. Des Moines Independent Community School District* (1969), 393 U.S. 503, defined a reasonable regulation as "one which measurably contributes to the maintenance of order and decorum within the educational system." 363 F.2d at 748. Since the Rules in question measurably contribute to such order and decorum they should be upheld as reasonable regulations. If the reasons advanced for the regulation are substantial, it will be upheld even if it limits speech. *E.g., Blackwell v. Issaquena County Board of Education* (5th Cir., 1966), 363 F.2d 749.

3. REASONS FOR RULE; SIMILAR RULES UPHELD BY OTHER COURTS.

There are many substantial valid reasons for prohibiting individuals, both students and outsiders, from selling or seeking contributions for any items, including newspapers, on school property. Some of these reasons were mentioned in *Cloak v. Cody* (N.D.N.C., 1971), 326 F.Supp. 391, which held that students' First Amendment rights were not violated by a board regulation which provided that:

> "No individual or non-school sponsored group be permitted to either solicit the sale of any item or seek contributions for any item or cause at any of the schools within the Chapel Hill City School System."

The Court upheld this rule and denied damages and an injunction to a student who was suspended for selling a student newspaper at a junior high school for the following reasons:

(a) The school program did not require that newspapers be available for purchase at school.

(b) The school operation created no hardships that would be satisfied only by being able to purchase the newspaper, *i.e.*, as in the case of snack shops by reason of lengthy intervals between meals and the termination of the school day.

(c) No school tradition was involved.

(d) The parents of the students did not want this to be available.

(e) The Court also noted that if students cannot be prohibited from exercising a clear commercial activity, such as the sale of or seeking donations for a newspaper, then all other school children can sell any commodity they like. "Under these circumstances it is not difficult to imagine the chaos that would result." (326 F.Supp. 391, at 396)

The Court cited as support *Breard v. Alexandria* (1951), 341 U.S. 622, 95 L.Ed. 1233, in which this Court upheld a solicitor's conviction under a municipal ordinance which prohibited solicitors of magazine subscriptions from calling upon the occupants of private homes without having been requested or invited to do so, stating that this did not deny freedom of speech and press. Surely, school boards have as much right to regulate such activities at their schools.

The Second Circuit, in *Katz v. McAulay* (2d Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933, emphasized the fifth reason, the pressures upon students of multiple solicitations, to justify and uphold a Board of Regents' rule prohibiting all solicitations of funds from pupils in public schools. It said:

> "Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary school pupils, as a captive audience, to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer the school system. Whether it is done a few minutes before school opens or a few minutes after, its effect is not so limited in time and it is plainly harmful to the operation of the public schools. If there is no regulation against it, literally dozens of organizations and causes may importune pupils to solicit on their behalf; and it is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation." (438 F.2d at 1061)

The student plaintiffs in *Katz* were threatened with expulsion if they distributed on school premises leaflets containing a request for contributions from their fellow

students for the criminal defense of certain activists. Their free circulation of such leaflets violated the board rule against solicitations and a local board of education rule forbidding any outside organization to use the school for the dissemination or release of information by flyers without first obtaining written approval by the board. The Second Circuit held that these rules were reasonable regulations and had a rational relationship to the orderly operation of the school system.

4. CASES CITED BY LOWER COURTS DO NOT JUSTIFY INVALIDATION OF THESE RULES.

Both the District Court and the Seventh Circuit refused to acknowledge these valid reasons for a policy against sales and solicitations and the special circumstances of a school environment which justify such a policy. Both Courts also ignored the cases upholding similar rules and cited as support decisions which are essentially irrelevant and can be readily distinguished from the case at bar.

(a) *District Court cases.*

(1) *Sullivan.*

The main case which the District Court cited to support its ruling was *Sullivan v. Houston Independent School District* (S.D. Tex., 1971), 333 F.Supp. 1149. The issue in this case was whether the board's new regulations on student publications violated the Court's prior injunction (307 F.Supp. 1238), which stated that:

> ". . . the peaceful, orderly, non-coercive distribution of written material before the commencement of classes in the morning and after the conclusion of classes in the afternoon by students lawfully on or off the premises of the school in which they are enrolled shall not be prohibited unless, under the circumstances, such distribution substantially and materially interferes with some normal classroom activity or normal school function as those phrases

are hereinabove defined." (333 F.Supp. 1149, at 1152)

The board then passed a regulation which prohibited all sales of publications, including sales at places *adjacent* to school premises in the mornings before normal class activity had begun, if such sales resulted in possession by students on school premises. (333 F.Supp. at 1154) The Court held that this constituted a violation of said injunction since it prohibited all sales *before* school, irrespective of disruption or the place of the sale.

Sullivan is readily distinguishable from the facts and rules of the case at bar. In *Sullivan*, the Court did not discuss the power of the board to regulate commercial activities in its schools. The board rule singled out the sale of student publications and made no attempt to regulate sales of other products. The ban on sales of newspapers applied to places entirely off the school premises. The student who was suspended for selling newspapers was not selling them on school property or during school hours. The Rules in the instant case are not similar since they do not apply to conduct exercised entirely outside school hours and off school premises but only restrict the right to use school property for commercial activities. Thus, the *Sullivan* decision is not a valid justification for the invalidation of these Rules.

Since the *Sullivan* decision was the major case relied upon by the District Court for all of its rulings, it should be noted that it was vacated by the Fifth Circuit, 475 F.2d 1071 (1973). The Court upheld the student's suspension and said that it cannot be seriously urged that the Board's new prior submission rule which, among other things, absolutely prohibited the sale of publications on school premises is either unconstitutionally vague or overbroad.

(2) *Riseman.*

The District Court also cited *Riseman v. School Committee of City of Quincy* (1st Cir., 1971), 439 F.2d 148, as support. (Findings of Fact and Conclusions of Law, Petition Cert. App. 4A) (Petition Cert. hereinafter "Pet.") The rule and facts of this case are completely irrelevant to those in the case at bar. The rule in *Riseman* prohibited the use of school facilities for advertising or promoting the interests of any community or non-school agency or organization *without Committee approval.* The Court held that this was unconstitutional, *as applied* to a student who sought to distribute material of a political nature (Student Bill of Rights and Information on Viet Nam), and was also invalid because no effort was made to minimize the adverse effect of *prior restraint.* It also noted that the rule appeared devised for a quite different purpose, *i.e.*, to control advertising or promotional efforts of organizations in the school. The Court did *not* say that such purpose was not legitimate or that the school could not prohibit such commercial activity. It was concerned only with two aspects of said rule: (1) the fact that the requirement of *prior approval* was not accompanied by any procedural safeguards, and (2) the unwarranted *application* of said rule to prevent student distribution of material without prior approval of its content.

In the case at bar, the present Rules prohibting sales or solicitations contain no prior restraints and cannot be applied to prohibit or require approval of the distribution or contents of student literature. Thus, *Riseman* is immaterial and cannot be used for support for declaring said Rules unconstitutional.

(b) *Court of Appeals case.*

In declaring the Board Rules fatally overbroad, the Court of Appeals relied on the constitutional standard for overbreadth set forth by this Court in the *criminal* case of

U. S. v. O'Brien (1968), 391 U.S. 367, 20 L.Ed.2d 67[illegible] *reh. den.*, 393 U.S. 900. This decision upheld the convict on of a man under a statute which made the knowing destruction or mutilation of a "draft card" a criminal offense. In determining that this statute was not overbroad, this Court applied the following four-pronged test:

> "... A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (391 U.S. at 377)

The Court of Appeals did not explicitly apply this test to the instant case, but implied that the Board Rules did not meet its following two requirements:

(1) *Governmental interest unrelated to the suppression of free expression.*

The Court of Appeals seemed impressed with plaintiffs' suggestion that the amended Board Rules were simply a deliberate device to suppress the distribution of student newspapers (Pet. App. 25A), despite this Court's caution that legislative motive is not a proper basis for declaring a statute unconstitutional. *U.S. v. O'Brien, supra,* at 384. Yet the original Board Rule requiring prior approval of all sales and solicitations at school was in effect many years before this cause of action. In addition, there was not one shred of evidence to support plaintiffs' suggestion that such was the motive, purpose or effect of the Rules. In fact, the only evidence is that the basic governmental interest in prohibiting sales and solicitations in the schools is simply to insure the smooth and proper functioning of the schools. (App. 12, 43) The other governmental interests discussed by the courts in *Cloak* and *Katz, supra,* are

closely related to this basic goal. All of these legitimate interests would be defeated by permitting sales and solicitations at school. None of these interests are related to the suppression of free expression. It should also be noted that these Rules do not prevent students from selling products anywhere but in the schools and do not prevent students from giving away newspapers before or after classes.

(2) *Incidental First Amendment restrictions no greater than is necessary to further governmental interests.*

In order to accomplish these valid governmental purposes, the school must be able to regulate and prevent any conduct which causes disruption or delay of classes, or congestion in the halls during the brief (0-5 minutes) passing time allotted between classes. It is essential to remember that there is a marked contrast between the setting of an elementary or high school and a university campus. Students in grades 1-12 have no "free time" and are required to be in a class or supervised study or activity virtually every minute of the school day. In some schools, particularly elementary and junior high, students are escorted from class to class. Even lunch periods are highly structured and regulated so that hundreds or thousands may eat in a very short time.

Thus, school officials in light of these special circumstances and the necessity to protect the school routine and proper operation of the school, determined that, with few exceptions, they cannot and should not set aside a time and place in the schoolhouse for either students or outsiders to solicit funds or sell products to other students. As in *O'Brien, supra*, both the governmental interests and the scope of the Rules are limited to preventing harm to the smooth and efficient functioning of the schools. The Rules cannot be more narrowly drawn to protect these

interests and assure good order in an educational atmosphere. Commercial activities, with a few exceptions permitted by the Rules (*i.e.*, yearbooks, raising funds for a school band, etc.) simply are non-school activities which have no place in the schoolhouse. For the Court of Appeals to insist that the Constitution requires a schoolhouse to be turned into a literal marketplace and its belief that the interests of good order and an educational atmosphere can be adequately served by regulating the time, place and manner of sales and solicitations reveals that the Court does not understand the routine or operation of an elementary or secondary school.

The Board submits that even applying the test in *O'Brien, supra,* to the case at bar, the two Rules in question meet all four of those requirements. It is clearly within the constitutional power of school boards to regulate the use of property under its control and to control student conduct to insure good order so that educational objectives may be accomplished. This Court has repeatedly affirmed that an important governmental interest lies in the implementation of "the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker, supra,* 393 U.S. at 507. The two Rules protect the substantial governmental interests discussed above, all of which are unrelated to the suppression of free expression. In addition, the Rules proscribe only non-expressive features of student conduct which raise a sufficiently high probability of harm—*i.e.*, the pressures upon students of multiple sales and solicitations and interference with the smooth and efficient functioning of the school. Therefore, any incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of said interests.

Although no vivid imagination is required to visualize the disruption that would result if the Board could not

prohibit sales and solicitations at schools, it is significant to note that in neither case upholding the right of the Board to prohibit sales and solicitations in schools (*Cloak* and *Katz, supra*) was there any evidence of a specific incidence of interference by the students with the operation of the school, or of any demonstrable collision with the rights of other students to be let alone. Both Courts considered the absence of any actual physical disturbance to be immaterial. The Court in *Cloak, supra,* said that plaintiffs' reliance upon *Tinker, supra,* was misplaced, since there was no First Amendment right involved and there was no attempt to prevent a student from giving away or distributing his newspapers in any manner he saw fit. (326 F.Supp. at 396)

Moreover, in *Tinker, supra,* the school singled out for prohibition a particular symbol—black arm bands worn to exhibit opposition to the Viet Nam war. This Court observed that other symbols, such as the Iron Cross, were permitted, and said:

> "Clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible." (393 U.S. at 511)

Since *Tinker* was decided solely on this issue (regulation of the content of speech), it is not applicable to the Rules in question. However, commercial activities in schools are necessarily time-consuming distractions and are inherently disruptive of the function, order and decorum of the school.

5. RULE IS NOT VOID FOR VAGUENESS.

The District Court, but not the Court of Appeals, also held Section 1.3.1.5, void for vagueness, but did not indicate what was unclear or uncertain about it. This Rule

clearly prohibits students from selling or soliciting funds for literature in the schools and is far from being vague even under the strict tests for criminal statutes; instead of merely forbidding "sales and solicitations," it defines those terms so that conduct which constitutes a sale or solicitation is clearly set out.

A statute is complete, with respect to definiteness and certainty when its provisions are sufficiently definite to enable one to know from its language whether it applies to him and to be able to ascertain therefrom his rights and obligations. *Varney v. Warehime* (6th Cir., 1945), 147 F.2d 238, *cert. den.* 325 U.S. 882.

For the five reasons discussed above, the two Board Rules governing sales and solicitations at school should be upheld.

B. DISRUPTION RULE 11.05, SECTION 1.1.1.3

Section 1.1.1.3 of Rule 11.05 (hereafter referred to as the Disruption Rule) provides:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis Public Schools, or injury to others."

Both courts held this rule facially void for vagueness and overbreadth.

The District Court gave no reason for its ruling but suggested that the following wording of this rule would be more apt to be constitutionally acceptable:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of, or likely to produce a substantial and material inter-

> ference with, or delay of normal classroom activity or normal school function." (Pet. App. 14)

The Board respectfully submits that it is not the proper function of a court to declare a rule so vague as to deny due process simply because it preferred other terminology which has the same meaning.

For the following reasons, the Court of Appeals erred in holding this rule void for vagueness and overbreadth. First, the Court's overbreadth reasoning, while it may be a useful or even valid method of reviewing a criminal statute affecting First Amendment rights, was improperly applied to a Board regulation which is not a statute and imposes no criminal sanctions.

The District Court and Court of Appeals have placed the Board on the horns of a serious dilemma. The District Court told the Board that its amended rule requiring prior review of student materials would be held unconstitutional. Opinions of the Court of Appeals clearly indicated that it shared this view and would invalidate a rule requiring prior review of student literature even if it was accompanied by elaborate procedural and substantive safeguards. *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355. In an effort to avoid future litigation and comply with the District Court's order to submit new rules (App. 2), the Board further amended its rules to allow only subsequent review and punishment which the Board preferred not to do, but which was the only alternative left open.

Then the Court of Appeals refused to follow the traditional and restrained approach which is to judge the rule in terms of the result worked by its application in the instant case. Instead, it subjected the Board to facial tests for vagueness and overbreadth used to judge the constitutionality of criminal statutes because of the alleged seriousness of the subsequent restraints forced upon the Board by the Court.

The Court of Appeals obviously believes that its proper role is to attack a Board regulation on its face and declare it void if it can conjure up some hypothetical invalid applications in imagined situations not before the Court. The Board submits that rigid constitutional constraints such as these, which are imposed by a judiciary untrained in the problems of operating public schools has the effect of precluding the exercise of prudent judgment by those knowledgeable and experienced in public school administration.

Unless the bare terms of the Board rules reveal inescapable and thoroughgoing invalidity, the Court's proper role is to eliminate unfair applications as they arise. However, the Court refused to allow the Board any opportunity to apply the rules. They were never even applied to the claimants in this case.

The Court's facial approach, if sustained by this Court, will have a tremendous and tragic effect on the administration of elementary and secondary schools in this country. If any student is disciplined for flagrant violation of a Board rule or wishes to challenge a Board rule, then under the Court's method of review of the regulation, if the student or Court could suggest hypothetical impermissible applications of the rule, it would be declared void on its face and the student could escape any punishment even if his own conduct was not privileged or protected. (Pet. App. 21.) Since it is difficult to think of a Board regulation that is utterly devoid of potential for unconstitutionality in some conceivable application, the Court could effectively abolish any Board policy it deemed unwise. The Board submits that this is exactly what the Court did when it declared the Disruption Rule void.

Second, the general rule on vagueness, as it has been developed in connection with the construction of criminal statutes, is that all that is required is that the language "conveys sufficiently definite warning as to the proscribed

conduct when measured by common understanding and practices." *U. S. v. Petrillo* (1947), 332 U.S. 1, 8, 91 L.Ed. 1877. Even measured by this criminal standard of specificity, the rule is sufficiently definite. It is quite clear what the rule as a whole prohibits, although the Court concludes that students could not be expected to understand the meaning of such common words as "disruption" or "significant." The Court of Appeals also appears to contradict itself where it poses hypothetical questions asking whether (and concluding that) the rule threatens punishment for students who distribute a pamphlet resulting in robust arguments or for distribution of a paper including derogatory remarks about a teacher, and at the same time concludes that school authorities could not reasonably forecast a substantial disruption from such incidents. However, the rule regulates *only* distribution that causes or is likely to cause a significant disruption. In addition, this Court has said that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *U. S. v. National Dairy Corp.* (1963), 372 U.S. 29, 32.

Third, many other courts have examined similar Board rules and phrases and found them neither overbroad nor too vague. For example, in *Eisner v. Stamford Board of Education* (2nd Cir., 1971), 440 F.2d 803, all literature to be distributed in school was to be submitted for prior approval by a school administrator who was to apply the following guideline:

> "No material shall be distributed which, either by its contents or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others." (440 F.2d at 805.)

Note that the *Eisner* rule was to be used as a basis for *prior* censorship and did not even specify that the dis-

order be either material or substantial. However, the Court explicitly assumed that the Board would not contemplate suppression of matter that would create only an immaterial disturbance.

In *Sill v. Pennsylvania State University* (M.D. Pa., 1970), 318 F.Supp. 608, aff. 462 F.2d 463, a school regulation forbidding activity that "unreasonably" interfered with school "operations" was held sufficiently specific. Since most courts, including the Seventh Circuit[1] use the words "school functions, work, purposes, processes, procedures and activities" interchangeably, the Board rule should not be held void for vagueness for using the same terminology.

Fourth, the Board rule, like the *Eisner* rule "departs in no significant respect from the similarly very general and broad instruction of *Tinker* itself." *Eisner, supra,* 440 F.2d at 808. This Court repeatedly stated in *Tinker, supra,* that it was permissible to regulate student expression if it was necessary to avoid material and substantial interference with "discipline, the work of the school or the rights of other students." (393 U.S. at 508, 509, 511) This is exactly what the rule in question purports to regulate and nothing more.

Fifth, this rule is not facially overbroad because it does not purport to prohibit a significant class of protected activity. This Court has repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. *Parker v. Levy, supra.* It said in *Parker*:

> "Thus, even if there are marginal applications in which a statute would infringe on First Amendment

[1] In *Scoville v. Board of Education Joliet Twp. H.S. District 204* (7th Cir., 1970), 425 F.2d 10, 15, the Court said that the Board must reasonably forecast that student distribution of a paper would "substantially disrupt or materially interfere with school procedures" before it could justify expulsion.

> values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . .' *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 580-581 (1973). And the Court recognized in *Broadrick, supra,* that 'where conduct and not merely speech is involved' the overbreadth must 'not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' 413 U.S. at 615." (p. 25)

Sixth, the rule sets standards for enforcement which are not subjective, but are readily determinable and easily understood within the framework of the public school system. Seventh, the courts should not hasten to strike down a school regulation on its face that is so clearly and reasonably relevant to the lawful mission or function of the educational institution, particularly before the Board has even been given an opportunity to apply it to a given fact situation.

Eighth, to the extent that the disruption policy on its face serves to discourage certain forms of expression in the school atmosphere, this limited curtailment is well within the power of the state. As this Court stated in *Younger v. Harris* (1971), 401 U.S. 37, 51, 27 L.Ed. 2d 669:

> "Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

Ninth, implicit in the Court's conclusion that this rule is fatally overbroad is the premise that students should

be able to cause *some type* of significant disruption in the school for which they could not be disciplined. This is revealed by the Court's statement that: "expression may lead to disorder under many circumstances where the expression is not thereby deprived of First Amendment protection." (Pet. App. 21) Since there is no normal educational purpose, function or process which students should be permitted to significantly disrupt, this rule is not unconstitutional for overbreadth.

Tenth, for the many other reasons stated in Question 1, the Court's invalidation of this rule should be reversed.

COURT'S INJUNCTION IS OVERBROAD

A crucial part of the issue of overbreadth raised in, but ignored by, the Court of Appeals, is that part of the District Court's Order, which permanently enjoins the Board from the promulgation or enforcement of any rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to written material, . . ." (Pet. App. 14) The Court of Appeals, in affirming the District Court's decision, upheld but failed to mention this broad injunction, although it completely undermines the legal authority and duty of the Board to formulate rules governing distribution of student literature in its schools. Under Indiana law (Ind. Stat. Anno. Section 28-5358 *et seq.*), students may not be suspended or expelled unless they have violated a written rule approved by the Board. Yet any such rule which would be held permissible under the guidelines of this Court in *Tinker, supra,* would constitute a violation of this broad injunction. Thus, this injunction should be vacated for overbreadth since the principles announced by this Court in *Tinker* would clearly allow school authorities to discipline students who distribute materials which cause riots or reactions which substantially disrupt or interfere with school discipline or activities.

Since the Court's injunction prohibits the Board from disciplining students for written material which is not constitutionally protected, i.e., language which causes disruptive "reactions," it also conflicts with the unassailable power of the State to suppress "fighting words—which by their very utterance inflict injury and tend to incite an immediate breach of the peace," recognized by this Court in *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, or words which "have all the effect of force," *Near v. Minnesota ex rel. Olson* (1931), 283 U.S. 697 at 716.

C. STUDENT DISTRIBUTION OF ANONYMOUS LITERATURE OR LITERATURE WHICH IS NOT WRITTEN BY A STUDENT OR SCHOOL EMPLOYEE.

The two amended Rules which subject students to disciplinary measures for distributing anonymous literature or literature which is not written by a student or school employee were declared unconstitutional prior restraints by the District Court. Presumably, they would have been upheld by the District Court had it believed they required no prior censorship or approval of student literature. The brief submitted by the Board to the Court of Appeals defined and differentiated between prior and subsequent restraints and pointed out that since these Rules did not require that students submit materials to obtain approval prior to distribution, they do not permit any prior censorship. The Court of Appeals apparently agreed but declared both Rules unconstitutional for overbreadth.

1. RULE 11.05, SECTION 1.1.1.4. REGULATING LITERATURE NOT WRITTEN BY STUDENTS OR SCHOOL EMPLOYEES.

This Rule provides:

> "No student shall distribute in any school literature that is not written by a student, teacher, or

other school employee; provided, however, that advertisements that are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

The Court of Appeals, though it assumed the validity of this Rule in some areas, held it overbroad because "it would prohibit use of materials written by individuals from all sorts of walks of life whose views might be thought by the students to be worthy of circulation." (Pet. App. 22-23) The Board disagrees because this Rule does *not* prevent students from using or quoting the ideas of others. Students remain free to write or express any view, their own or others.

The Board submits that the First Amendment rights of *non-students* is not an issue in this case and that it is within the Board's discretion to prohibit the use of its schools for student distribution of literature written by non-students or other persons not connected with the school. Put another way, since non-students or outside organizations have no legal or constitutional right to sell or distribute anything, including printed material, in the schools, they cannot subvert this basic principle by having students distribute their material.

While it may not be reasonable to restrict student expression at school, no court has held that it would be unconstitutional to limit student newspapers to publishing articles written by students. *Antonelli v. Hammond* (D.Mass., 1970), 308 F.Supp. 1329, indicated that such a rule, even at the college level, might be reasonable.

As support for its ruling, the Court of Appeals cited one case, *Police Department of Chicago v. Mosley* (1972), 408 U.S. 92, 33 L.Ed.2d 212, in which this Court held unconstitutional a criminal disorderly conduct ordinance condemning picketing near schools except the peaceable picketing of any school involved in a labor dispute. It declared

that the ordinance violated the equal protection clause since it described permissible picketing in terms of its subject matter and made an impermissible distinction between labor picketing and other peaceful picketing.

This case is not valid support for holding the Board Rule unconstitutional for overbreadth for the following reasons. First, a criminal ordinance should not be compared to the School Board's regulation for the many reasons discussed above. Second, a schoolhouse is not a public forum in the same sense as sidewalks or streets. Before the Board Rule can be held unconstitutional, it must be shown that non-students and outside organizations have a constitutional right to use the particular place (schoolhouse) where they seek to speak or distribute materials. The Board submits that such outsiders have no right to distribute their written material at school or to use students to reach the vulnerable captive audience found in every school. Third, the main objection in *Mosley, supra,* was that the ordinance described permissible picketing in terms of the *subject matter,* permitting picketing only on the subject of a school's labor dispute. The Board Rule places no restrictions on the subject matter or views expressed by students.

If the school must open its doors to all outsiders who have, or think they have, something to say, the school could not accomplish its educational objectives. This Rule is essential to prevent the distraction and interference with school functions which would result if students were permitted to sell or distribute materials written by non-students and outside organizations. It is a legitimate interest of the Board not only to prevent the use of the school for non-school purposes, but also to protect students who would become the tools of outsiders who seek to reach and influence the captive audience of immature minds at schools.

Thus the Rule is reasonable and is essential to protect legitimate governmental interests and since it places no restrictions on what students can quote or write, it does not violate their First Amendment rights.

2. RULE 11.05, SECTION 1.3.1.6. — ANONYMOUS LITERATURE.

Section 1.3.1.6. of amended Rule 11.05 provides:

> "No distributable literature shall be distributed by any student in any school unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

This Rule is essential to protect several compelling interests and legitimate goals of the Indianapolis public schools.

First, such a rule is necessary to identify those responsible for fraud, libel and obscenity. Because the right of free speech or press is accompanied by correlative responsibility for its abuse and this Rule provides the *only* reasonable means to fix responsibility for such abuses it must be upheld.

Second, in view of the fact that the lower courts permit no prior censorship of any material distributed by students at school, and also require the Board to set aside times and places in schools for such distribution, the Rule aids in protecting the Board and school officials who would be subjected to lawsuits for permitting distribution of materials which are obscene or contain libelous or fraudulent statements or cause riots or substantial disruption of the school.

Third, the school has an awesome duty to protect the children in its charge, and this Rule enables them to accomplish this responsibility. Since children at school constitute

a vulnerable captive audience, persons should not be able to hide behind the cloak of anonymity to promote obscenity, drugs, riots and other crimes.

Fourth, this Rule would also provide the only reasonable means of enforcing Section 1.1.1.4. of Rule 11.05, should it be upheld by this Court. Alternatively, if Section 1.1.1.4. is not upheld and students are permitted to distribute materials written by non-students or persons not connected to the school, it becomes even more imperative to disclose those responsible for such publications.

This rule is also made necessary and reasonable in view of the fact that the *Corn Cob Curtain*, unlike the press generally, has *no editors* and no person in charge and prints any article received at a post office box, as is, without any editing. (App. 28) Since it is the policy of the anonymous persons responsible for this newspaper not to edit or divulge the authors of any articles, persons are encouraged to write libelous or obscene articles since they could not be held responsible.

The Rule could not be more narrowly drawn to accomplish these legitimate goals and interests. It should be noted that the Rule does not impose any prior restraints and places no restrictions upon what can be said, where it can be said or when it can be said. No attempt is made to require authors to publish their sources of information; they remain free to seek news from any source. The Rule is also limited to literature which is to be distributed at elementary and secondary schools so students remain free to distribute anonymous literature beyond the schoolhouse gate. This Rule simply requires that a student who exercises his right of free speech through a student publication identify himself just as one who speaks from a school platform or in a classroom. All students in school are required to identify themselves if requested because anonymity has no place in the specialized environment of a school if it is to function properly and achieve its goals.

(a) *Cases Relevant to Section 1.3.1.6.*

Only one case was found which ruled on the precise question at issue. In New York the commissioner rejected a challenge to the board regulation requiring the names of the authors and publishers to appear in the student publication. The same obligations of responsible journalism which pertain to official student publications and the public press apply as well to "unofficial" student newspapers. "The concept of anonymity is inconsistent with the requirements of responsible journalism." *Matter of Schiener*, 11 Ed. Dept.Rep. —, N.Y.Comm. Dec. No. 8467. *In Eisner v. Stamford Board of Education* (1970), 314 F.Supp. 832, even the plaintiff student acknowledged that the board of education had power to require that each article identify its author. In *Sullivan v. Houston Independent School District* (5th Cir., 1973), 475 F.2d 1071, the school rule required that the publications to be distributed at school contain the names of the contributors, editors and publishers. Although this particular section was not at issue, the Court noted that the rule was neither vague nor overbroad. This Court in *Lewis Publishing Co. v. Morgan* (1913), 229 U.S. 288, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner and stockholders. A direct analogy can be made to the instant case. The Board's control over the use of its schools may be compared to the government's control over the use of its mails.

In addition, most states have statutes prohibiting the anonymous distribution of materials relating to political campaigns. *Talley v. California* (1960), 362 U.S. 60, 70, 4 L.Ed.2d 559, 566. This Court upheld the Federal Regulation of Lobbying Act, in which Congress requires those engaged in lobbying to divulge their identities and certain other information. *United States v. Harriss* (1954), 347 U.S. 612, 625, 98 L.Ed. 989. This Court's response to the argument that some persons may choose to remain silent

because of fear of possible prosecution for failure to comply with the Act was that "even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self censorship . . .". (347 U.S. at 626) The Board submits that any similar deterrent effect its Rule might have upon a student's speech is too indirect, speculative and insubstantial to justify holding the Rule unconstitutional.

In *Talley v. California, supra*, this Court declared overbroad an ordinance making it a *criminal* offense to distribute "*any* handbill in *any* place under *any* circumstances" unless it contained the names and addresses of the persons who printed, wrote, compiled, manufactured or distributed it. It is the opinion of the Court of Appeals that *Talley* requires the Board Rule to be limited so as to apply only to libelous or obscene articles. However, it would be both ridiculous and futile for the Board to require only the authors of such materials to identify themselves. The above statutes upheld by this Court, which were designed to present the same abuses, were not so limited. It is these cases rather than *Talley* which control the instant case and require approval of the Board Rule.

D. DISTRIBUTION DURING CLASS HOURS.

Both courts declared unconstitutional for ovebreadth Section 1.3.1.1. of amended Rule 11.05, which reads as follows:

> "No distributable literature shall be distributed by any student in any school while classes are being conducted in the school in which the distribution is to be made."

The District Court said that the Board could prohibit distribution of literature *at times* and *in places* where *normal classroom activity* is being conducted. (Pet. App. 13) Normal classroom activity was defined by the Court as any organized educational activity under the

direct supervision of a school official. Thus the Board's Rule is not any more broad than what the District Court itself sanctioned in its injunction. Both clearly prohibit distribution when classes are in session, which is generally 8:30 a.m.-3:30 p.m. The *places* of said classes are obviously all throughout the school. Thus there is no constitutional significance in the fact that the Board Rule prohibits distribution *in the school* while the District Court sanctioned prohibition *at places* where normal classroom activity is being conducted.

The Court of Appeals for the Seventh Circuit apparently concedes that it is constitutionally permissible to prohibit distribution in the classroom itself or elsewhere in the schools if all the students are required to be in a class. However, it apparently based its ruling of overbreadth on the assumption that there are periods when substantial numbers of students are in school, but are not involved in classroom activity at the time classes are in session for other students and that the Board could not reasonably forecast disruption if students distributed newspapers during this time. The assumption that some students would be at school and yet not in class while classes are in session is not warranted by the evidence. The only time this could possibly occur would be during a split lunch or split assembly period. If the school was small enough so that all students ate at the same time, then distribution in the cafeteria would not be prohibited by this Rule. Also, to prohibit distribution of literature in a split lunch or assembly period is not an impermissible infringement upon students' First Amendment rights, since it is not unconstitutional to limit their uses as places to eat or watch programs.

The Board submits that *Grayned v. City of Rockford* (1972), 408 U.S. 104, a criminal case cited by the Court of Appeals as support, does not justify its position that this Rule is facially unconstitutional. This Court, in *Grayned*, stated that the "crucial question is whether the

manner of expression is basically incompatible with the normal activity of a particular place at a particular time" because "the nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." (408 U.S. at 116) The Board Rule is simply a legitimate reasonable exercise of its power to regulate the time and place of distribution, since to allow distribution in the cafeteria where many students are required to eat in a brief period, or in an auditorium during an assembly, would interfere with the proper order and function of both.

It is important to remember that although in colleges and universities some students may be in class while others have no class, this is not the situation in elementary and secondary schools. Students in the Indianapolis public schools simply have no free time during school—they are in a supervised classroom, study hall or other activity every period of the school day.

This Court in *Tinker, supra*, recognized that First Amendment rights must be applied in light of the special characteristics of the school environment. Thus distribution which might be perfectly appropriate in another public place or in a college or university may unduly interfere with the highly structured activities of a primary or secondary school.

QUESTION THREE

Are words found throughout a student newspaper such as "f - - -," "eat shit," awarding points for the number of "freak girls screwed," and a cartoon picturing the principal sitting on a toilet in which a student has placed a bomb which explodes, ending with the comment, "I may have gotten rid of the school, but I'm still eating the principal's shit," obscene as to minors and can school authorities punish students for the use of such language in elementary and

secondary schools, even if such language is held to be filthy, vulgar, and indecent, but not legally obscene as to minors?

A. CORN COB CURTAIN IS OBSCENE AS TO MINORS.

Section 1.1.1.1. of amended Rule 11.05 subjects a student to disciplinary measures if he distributes in any school literature that is obscene as to minors. Although the validity of this Rule is not an issue since it was upheld by the District Court, the question remains as to whether the use of such language as quoted above in the *Corn Cob Curtain* (hereafter sometimes *CCC*) is obscene as to minors. The District Court made no ruling on the Board's claim that the *Corn Cob Curtain* was obscene as to minors. However, the Court of Appeals, with one dissent, clearly indicated that the *CCC* contained no material which could be considered obscene as to minors. (Pet. App. 28)

Although the Supreme Court has not specifically defined the concept of obscenity as to minors, it has indicated that the state in enacting criminal statutes, may adopt special standards for children which are broader than those embodied in criminal legislation aimed at controlling dissemination of obscene materials to adults. *Ginsberg v. New York* (1968), 390 U.S. 629, 640, 20 L.Ed.2d 195, 204. Thus "material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity may vary according to the group to whom the questionable material is directed or from whom it is quarantined." (390 U.S. at 636)

This Court, in *Ginsberg v. New York, supra,* advanced two basic interests which justify limitations upon the availability of sex material to minors. First, parents and teachers have the primary responsibility for children's well-being and a legislature could properly conclude that they are entitled to the support of laws designed to aid dis-

charge of that responsibility. Second, the State also has an independent interest in protecting the well-being of its youth. The State's interest "to protect the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well developed men and citizens" was also recognized by this Court in *Prince v. Massachusetts* (1943), 321 U.S. 158, 165, 88 L.Ed. 645, 652.

Ginsberg upheld a criminal statute containing a three-pronged test for judging the obscenity of material sold to minors which was virtually identical to the Court's statement of the elements of obscenity in *Memoirs v. Massachusetts* (1966), 383 U.S. 413, 418. Thus material is obscene as to minors when it (1) predominately appeals to the prurient, shameful or morbid interest of minors, and (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is utterly without redeeming social importance for minors.

Since this Court in *Miller v. California* (1973), 413 U.S. 15, decided *after* the hearing in the case at bar, rejected the *Memoirs* standard and set forth a new test of obscenity, the Board submits that the *Miller* standard could easily be adapted to "obscene as to minors" as follows: Material is obscene as to minors if:

(1) The average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest of minors, and

(2) the work depicts or describes sexual conduct in a manner patently offensive to prevailing standards of the adult community with respect to what is suitable material for minors, and

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value to minors.

Keeping in mind that the Board is attempting to regulate only materials distributed in its schools and would impose no criminal sanctions, the filthy language and cartoons found in the *Corn Cob Curtain,* some of which is reprinted at App. 57-63, should be declared obscene as to minors under either or both of the above standards.

The remaining question is to what is the standard of obscene as to minors to be applied in the case at bar? In other words, what constitutes the "whole?" It should be noted that in developing the "as a whole" test, the courts were generally reviewing books or pamphlets which contained only a single story or article, *i.e.*, a single dominant thesis or theme. It was quite natural under the circumstances for the courts to treat the entire physical object under scrutiny as the proper "whole" since it typically was a book, pamphlet or film which contained a single dominant theme. While this Court has embraced the "as a whole" standard, it has not yet defined the term with any specificity and has apparently never explicitly stated what constitutes the whole when one is reviewing a newspaper, consisting of numerous unrelated articles, each having a separate dominant theme.

It is submitted that each individual, unrelated article or cartoon in a student newspaper distributed at school must be considered a separate "whole." This proposition is not without substantial support even in adult criminal obscenity cases.

The rule in England is that a magazine or newspaper may be declared obscene on the basis of a single story or article contained therein. *R. v. Anderson, et al.* (1971), 3 All E.R. 1152. In this case a magazine called *Oz* contained many serious and wholly innocuous articles but also contained obscene articles and pictures. The Court held that in reviewing a magazine consisting of a number of distinct items, the test for obscenity should be applied to the individual items in the magazine. If, when so applied, the

test shows one item to be obscene, that is enough to make the entire magazine obscene. (p. 1158) Thus, in England, while a book containing a single theme is the "whole," each article in a magazine or newspaper is considered the "whole."

Many courts in the United States have also accepted the view that with regard to magazines and newspapers the "whole" means the individual story, cartoon or picture rather than the entire physical object under scrutiny. For example, in *Cincinnati v. Walton* (Ohio Mun., 1957), 145 N.E. 2d 407, the Court stated:

> "The prosecution has contended in its brief that the generally accepted requirement that in judging obscenity a book must be viewed as a whole does not apply to magazines where stories and pictures are not related to one another. In this the court generally concurs. The 'as a whole' test was built up by the courts to escape the absurd result that was produced when one took, out of context, isolated passages from a sincere book. But where the parts are not specifically related—where, as here, you have a succession of pictures and stories, each conveying an individual message—each can be judged individually." (p. 414)

The same view of the "whole" was also adopted in *Flying Eagle Publications, Inc. v. United States* (1st Cir., 1961), 285 F.2d 307 (obscene illustration in magazine considered separately and is not controlled by innocuous textual material); *People v. Kirkpatrick* (1970), 64 Misc.2d 1055, 316 N.Y.S.2d 37, *aff'd.* 329 N.Y.S.2d 769, *aff'd.* 343 N.Y.S.2d 70 (each individual cartoon story considered a separate "whole" in a magazine); *People v. Pocket Books, Inc.* and *People v. Hamilton News Co.* (1963), 38 Misc.2d 1004, 239 N.Y.S.2d 631 (each story, article or picture considered separate "whole" in a magazine); *People v. Wasserman* (1970), 27 Mich.App. 16, 183 N.W.2d 313 (each article or story in a newspaper considered separately);

People v. Richmond County News, Inc. (1961), 216 N.Y.S. 2d 369, 9 N.Y.2d 578 (individual story or picture in magazine); *Scherr v. Municipal Court for Berkeley-Albany Judicial District* (1971), 15 Cal.App.3d 930, 93 Cal.Rptr. 556 (individual unrelated article in newspaper).

In *State v. Kois* (1971), 51 Wis.2d 668, 188 N.W.2d 467, 473, the Court stated:

> "The material taken as a whole cannot and should not encompass the entire newspaper, but should be restricted to that part which is materially associated in continuity and unity of thought with the alleged obscene matter. A novel or a movie is a unified whole, a complete story, which has unity and coherence of thought and purpose."

On appeal the defendant's convictions on two counts were reversed by this Court in *Kois v. Wisconsin* (1972), 408 U.S. 229. Nevertheless, this Court refused to reverse the Count 1 conviction on the ground that the court erred in not considering the entire newspaper as the proper "whole." In applying the *Roth* standard, the Supreme Court apparently did not focus its attention upon the entire newspaper, but rather considered an individual article and two accompanying pictures as the proper "as a whole" to which the obscenity test should be applied. (408 at 231)

Defendant was convicted on Count 2 for publishing another newspaper issue which contained two pages of poems, of which one was entitled "Sex Poem." Here again, this Court on review apparently did not focus its attention upon the entire newspaper as a physical object, but considered the proper "whole" to be at most the two pages of poems. The Supreme Court said:

> "In this case, considering the poem's content, and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art.

> While such earmarks are not inevitably a guarantee against a finding of obscenity, and while in this case many would conclude the author's reach exceeded his grasp, this element must be considered in assessing whether or not the 'dominant theme of the material appeals to the prurient interest' . . . We do not believe that it can be said that the dominant theme of this poem appeals to the prurient interest." (408 U.S. 231-236)

Regardless of whether this Court accepts an individual newspaper item containing a single theme as the proper whole to which an obscenity standard may be applied in a criminal case, it is submitted that this is the only reasonable method of judging a student newspaper to be distributed among juveniles in kindergarten through high school.

The consequences of considering the entire newspaper as the proper whole would be tragic. The obvious result would be that material which is obscene could be disseminated to children with impunity under the protective umbrella of physically connected, but otherwise unrelated non-obscene material. Since it would be so simple to add or include innocuous subject matter in any newspaper containing material which, by itself, is obscene, no newspaper would be found obscene.

The blazing headline of one issue of the *Corn Cob Curtain*, "ON YOUR ASS," which is totally unrelated to the article beneath it (App. 58), the vile toilet cartoon (App. 62-63), assigning points for the "number of freak girls screwed" (App. 57-58), the use of filthy words such as "f - - -," "eat shit," "f - - - off," are all obscene as to minors and have no proper place in a newspaper to be distributed to children at school.

This Court can also take judicial notice of the tendency of most juveniles to "zero in" on filthy language and pictures. They seem to attract children like a magnet. Such

language can only appeal to the prurient, shameful interest of minors. It can scarcely be contended that the four-letter words appeal to their intellectual or educational interest.

All of the evidence in this case (with the possible exception of a few self-serving statements of some of the claimant-students), reveals that the *CCC* is obscene as to minors. Affirmations signed by the principals of Indianapolis high schools and 220 parents (App. 63-64) indicate that the bomb cartoon (App. 62-63) and the definition of a hippie (App. 57-58) are offensive, embarrassing, disruptive and obscene as to minors applying the *Memoirs-Ginsberg* standard.

The affidavit (App. 11-17) of Dr. Karl Kalp, who has been with the Indianapolis School System since 1948 and is now Superintendent, states some of the harmful effects of allowing obscene, indecent material in the schools. He believes that it would, in addition to harming the students, cause unrest, distractions and disruption, a lack of respect for teachers and administrators, and would lower the morale of teachers who "will despair of trying to teach anyone about decency and moral obligations and responsibilities . . ." (App. 16) No counter affidavits were offered.

The claimant students testified that they did not write any of the obscene words, phrases or cartoons found in the *CCC*. (App. 32, 40) Susan Chandler (student claimant) said the four-letter words "weren't necessary" for her to use and she thought it was improper to use such language at home. (App. 42) Jeff Jacobs testified that neither he nor his friends used "language like that, especially in articles that go before the people." (App. 32-33); that it upsets him to be around people who use these four-letter words; and that he probably wouldn't associate with such a person. (App. 38) The students' counsel indicated that Jeff would be embarrassed if required to read articles containing the four-letter words. (App. 35-36)

Although two of the four judges stated that the *CCC* was not obscene and clearly it would not be legally obscene for adults, the Board submits that the lewd, filthy language which constitutes an inescapably dominating part of several articles, if not the entire newspaper, is obscene as to minors and that it is not unconstitutional for school authorities to prevent the distribution of such filth to school children or to reprimand and punish students who distribute it at school.

B. SCHOOL AUTHORITIES CAN DISCIPLINE STUDENTS WHO USE OR DISTRIBUTE SUCH LANGUAGE EVEN IF IT IS HELD TO BE FILTHY, VULGAR AND INDECENT, BUT NOT LEGALLY OBSCENE.

There are countless valid reasons for, and substantial educational interests to be served by prohibiting the use and distribution of filthy, indecent language in schools housing kindergarten through grade 12 students.

First, the student body of any primary or secondary school is a "closed" group which neither the pupil nor his parents have any choice about joining. As such, it is reasonable that parents expect that the Board, their elected representatives, should exert influence to maintain a quality of literature on the school grounds—in classrooms and outside the classrooms, that reflects and is commensurate with the goals of education that are accepted by society in general and the local community in particular. Public education cannot survive with any other basic concept. (Kalp's affidavit, App. 14)

Certainly parents who do not allow their children to use, read or hear this kind of language at home have the right to demand and expect that they will not be subjected to such filth in the schoolhouse. To deny them this reasonable expectation, especially when the state forces them to send their children to school, would constitute an outrageous

and disgusting injustice. The result can only be the most vulgar society imaginable. If this is to be the course of our schools, then by all means let us get on with it. If it is not to be the course of our schools and country, let us say so and be done with it.

Second, if this Court holds that children must be permitted to use and distribute gutter language in the schoolhouse then it will be impossible to obtain any basic level of decency or an academic atmosphere, both of which are essential for learning to take place. The conclusion of two members of the Court of Appeals that the use of such language as is found in the *CCC* is not likely to materially impair the accomplishment of educational objectives is wishful thinking at best. Not one shred of evidence supports this naive belief. It also ignores and rejects the expertise and judgment of Dr. Kalp who stated (App. 15-16) that if the school permits distribution at school of the vulgar, obscene and defamatory language contained in the *CCC*, it is in effect lending its support and approval to that kind of material, and at the same time trying to teach children the use of proper language and the avoidance of vulgarity, crudity, obscenity and defamatory language. A contradiction such as this can only confuse and harm children. If children need not practice, at least in school, what is "preached" to them, the "preaching" or teaching is simply a futile waste of time.

Moreover, Dr. Kalp indicated that such a contradiction (between what is taught and practiced) would not exist long because "(m)any teachers will despair of trying to teach anyone about decency and moral obligations and responsibilities if this type matter is distributed in our schools." (App. 16)

Third, a great majority of the children in the school system would be very much opposed to the language contained in the *CCC* and would lose respect for an administration that encouraged or allowed its distribution. Once losing

respect for the administration, these children might also feel that there was no use in following the advice of adults who advised them in one fashion in the classroom and then approved distribution of offensive and obscene materials in the halls. (App. 15) Dr. Kalp believes that this

> ". . . definitely would discourage many students and cause them to lose faith in their teachers. We can all recount numerous situations where a young child has had only his teacher to look to for training with respect to moral codes, decency, honor and integrity. If this trust is shattered many of our children will have no desirable adult models to emulate." (App. 15-16)

Fourth, it is reasonable to forecast substantial distractions, delay of school work and disruptions in any elementary or secondary school where gutter language is sanctioned. "To satisfy the whim of an infinitesimal minority of the student body, the learning conditions for all students are imperiled." (App. 13-14) Does this Court hope that children are or will become so desensitized to four-letter words such as f---, that it would be unreasonable to expect their use to cause distractions and disruptions? When that point is reached it will be a signal that our society is in a state of moral decay and in danger of collapsing as have other civilizations in the past which have cast aside decent standards and self-restraint.

Alexander Pope succinctly summarized the result in "The Monster Vice" in 1705:

> "Vice is a monster of so frightful mien, as, to be hated, needs but to be seen; yet seen too oft, familiar with her face, we first endure, then pity, then embrace."

This Court in its review of countless criminal obscenity cases has undoubtedly seen more filthy literature than most persons in this country. The language and cartoons in the *CCC* will probably seem tame and harmless by comparison.

Hopefully this Court has not become insensitive to such language and to the fact that it is not how many times four-letter words appear in a student newspaper that is significant, but whether children should be exposed to these uninvited shocks at all in the schoolhouse. Fifth, Dr. Kalp's belief that some of the material contained in the *CCC* will create a danger of antisocial conduct or will probably induce its recipients to such conduct (App. 46, 47, 51) should not be dismissed as frivolous. Few persons seriously contend that indecent literature has no harmful effects on children.

Sixth, just as parents are charged with the discipline of children in the home, so too are teachers and school officials charged with the responsibility of the training and conduct of children while in school. Schools, like parents may be criticized and brought to task for failing to circumscribe the conduct of children in their charge. In order to accomplish educational objectives it is important for schools to teach students to utilize socially acceptable forms of speech and to present and discuss issues without resort to the utilization of shocking or indecent speech. If this cannot be taught in the schools, it cannot be taught anywhere. And this cannot be taught if school authorities are forbidden to reprimand and discipline students who use indecent language.

Seventh, surely school authorities have more authority and reason to control indecent speech by minors in the schoolhouse than federal courts have in disciplining adults who insert indecent matter in a brief.

Rule 11A of the Federal Rules of Civil Procedure reads in applicable part:

> "For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

Rule 40(5) of the Rules of the Supreme Court of the United States provides in part, as follows:

> "5. Briefs must be . . . free from . . . scandalous matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court . . ."

This Court could not be consistent in holding that the Board cannot demand decency in its elementary and secondary schools while permitting the federal courts to require decency in their courtrooms and in briefs.

The Board does not mean to suggest that these Court rules should be abolished or that they present any risk of suppressing ideas, but merely suggests that there is far greater justification for attempting to limit the exposure of children to indecency in the schoolhouse than in attempting to so limit the exposure of the adult judiciary.

Eighth, what possible benefit or value is to be derived from permitting children at school to express themselves in vulgar, obscene language such as "The *CCC* eats shit. Why don't you?" or "f - - - off" (App. 60, 62). Does not the following unanimous observation of this Court in *Chaplinsky v. New Hampshire, supra*, apply to the distribution and use of vile four-letter words by children in school?

> "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" 315 U.S. 568, 572.

Ninth, it is crucial for this Court to keep in mind the significant differences between the case at bar and all the criminal obscenity cases heretofore reviewed by this Court. In the instant case we are concerned, not with a statute, but with a *Board policy* and regulation; not with adults, but with *minors*; not with what is permissible to regulate in the general community, but only with what lan-

guage and conduct may be controlled in the *schoolhouse,* not with persons who are voluntarily seeking out filth, but with a *captive audience* of vulnerable children, not with criminal punishment and the necessary controls on this dangerous power, but with *mild disciplinary measures.*

Tenth, if this Court refuses to allow the Indianapolis schools to exercise control over the distribution of such foul language as is found in the *CCC,* it will deprive elementary and secondary schools across the nation of a duty, power and discretion they have had since public schools first opened their doors. Although few challenges to the power of schools to discipline students for indecent language have been presented to the courts, most courts considering the issue have upheld the school. See, *e.g., Baker v. Downey City Board of Education* (C. D. Calif., 1969), 307 F.Supp. 517 (upheld suspension of high school students for distributing off school property a student newspaper containing the words "f---" once, "bulls---" several times, two drawings of nude ladies and a drawing of President Nixon making an obscene gesture; *Goldberg v. Regents of University of California* (1967), 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (upheld expulsion of university students for their use of such obscenities as "pissed off," "f--," and "asshole."

For the above ten reasons (by no means an exhaustive list), this Court should uphold the right of the Board and school officials to exercise both prior and subsequent restraints against students who use and distribute the filthy language and cartoons contained in the *CCC* to children in elementary and secondary school. How to label such filth seems immaterial and does not diminish the need to maintain a basic level of decency and order in the schools so that vital educational objects may be achieved. If the word "f---" is not obscene as to minors when used in the schoolhouse, then obviously no four-letter word can be considered obscene as to minors. But even if this kind

of language is not legally obscene as to minors it has no proper place in the elementary and secondary schools. It seems rather ridiculous to allow the many restrictions on speech by students imposed by schools such as prohibiting students from whispering to others, or speaking in class without permission and then require the school to set aside a time and place in the schoolhouse for these same children to write and distribute gutter language.

QUESTION FOUR

PRIOR RESTRAINT. Does the United States Constitution prevent a school board from adopting reasonable rules which would require prior approval by school authorities of literature before its distribution in elementary and secondary schools?

The original Board Rule which was not appealed required the Superintendent's prior approval of all materials to be distributed at school, but did not contain any procedural or substantive safeguards. Because the Court of Appeals had declared a similar rule unconstitutional in *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355, the District Court ordered the Board to amend its Rule. (App. 1-2) The full text of this amended Rule is reprinted at App. 17-20. Although the amended Rule still required prior review of student literature, it added the procedural safeguards suggested by the Court of Appeals for the Second and Fifth Circuits, such as a prompt decision based on written guidelines, and judicial review. Despite these safeguards, the District Court again ordered the Board to submit new Rules (App. 2) because it believed no prior restraints were permissible. This order resulted in the second amendment of Rule 11.06, permitting only subsequent restraints, the provisions of which were discussed in Question Three.

The Board submits that the lower Courts' assumption that no prior restraints are constitutionally permissible is

erroneous and that the amended prior restraint Rule provides adequate substantive and procedural safeguards and should be upheld by this Court. In *Near v. Minnesota* (1931) 283 U.S. 697, 75 L.Ed. 1357, Chief Justice Hughes said:

> "The protection even as to previous restraint is not absolutely limited." (283 U.S. at 716)

And this Court, in *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, stated:

> "There are certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any constitutional problem. These include the *lewd* and *obscene*, the *profane*, the *libelous* and the *insulting or fighting words* . . . those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace." (315 U.S. 572) (Emphasis added)

More recently the view that prior restraints are not necessarily unconstitutional under all circumstances was reaffirmed by this Court in *Bantam Books, Inc. v. Sullivan* (1963), 372 U.S. 58, 70, n. 10.

These pronouncements give strong support to the various courts which have upheld the rights of boards of education to require prior restraints with respect to certain types of student expression, subject to substantive and procedural safeguards. If the bases for previously restraining student literature are clearly set forth in the school regulations and are valid, that is to say, such as would justify a subsequent restraint or punishment, then in view of the special nature and purpose of schools and the immaturity of its inhabitants, it is reasonable to permit prior restraints.

Such was the holding in *Eisner v. Stamford Board of Education* (2d Cir., 1971), 440 F.2d 803. The Court examined a prior restraint rule in the context of a secondary

public school and found the rule to be valid in principle although procedurally insufficient. The *Eisner* rule provided:

> "No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.
>
> "In granting or denying approval, the following guidelines shall apply.
>
> "No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others."

The Second Circuit held that this standard by which, school officials may prevent distribution on school property was neither overbroad nor too vague, since "it merely vests school officials . . . with authority which under *Tinker* they may constitutionally exercise . . ." (440 F.2d at 808) This standard is identical to the first guideline of the Indianapolis Board Rule. To be valid, however, the Court held that the following *procedural* deficiencies must be corrected:

(1) The rule must specify a definite brief period within which review of submitted material will be completed; (2) and specify to whom and how materials may be submitted for clearance; (3) and must require prior submission only where there is to be a substantial distribution of written material so that a student would not be required to submit a single note or periodical to the school before he could pass it to another student.

It should be noted that the Indianapolis Board Rule provides for all of these procedural safeguards. It requires only materials that will be generally distributed to be submitted to the principal and the school's decision must be

given the student by 9:00 a.m. of the second regularly scheduled school day following the date of submission. In fact, the Board Rule provides additional safeguards not required by the Second Circuit. If the material is not approved, the student must be notified in writing of the rejection and the reason for the rejection must be included. It also provides that the material is presumed to be approved for distribution if the student does not receive notice of the decision within the allotted time. In addition, the student is given the right to a prompt hearing if he desires to appeal the decision.

In *Shanley v. Northeast Independent School District* (5th Cir., 1972), 462 F.2d 960, a board policy which required the principal's prior approval of "the production for distribution and/or the distribution of petitions or printed documents of any kind, sort, or type . . ." was declared fatally overbroad because it required advance approval of the distribution of materials written by students at any time and in any place and for any reason and contained *no* substantive or procedural safeguards. It was also held unconstitutionally applied to suspend students who distributed a student newspaper entirely off school property and only before and after school hours where no disruption actually occurred or was reasonably foreseeable and the content of the paper was not obscene, libelous or inflammatory.

Nevertheless, the Court emphasized that it was not unreasonable to require that materials destined for distribution to students be submitted to the school administration prior to distribution and the Court would not limit prior restraint to only those materials which are obscene, libelous or inflammatory. (462 F.2d at 971)

In examining the authority of the Board to regulate student expression in its schools, the Court found the nature of the place in which the prior restraint operates to be of critical significance and said:

> "While a school is certainly a market-place for ideas, it is just as certainly not a market-place. The educational process is thwarted by the milling, mooing, and haranguing, along with the aggressiveness that often accompanies a constitutionally-protected exchange of ideas on the street corner. There is, of course, a substantive difference between schools and the street corner in terms of weighing the sometimes competing interests of a completely free flow of any and all expression with the requirement that there be order and discipline. Thus this court has endeavored to give 'careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner.' (Citations omitted) Because high school students and teachers cannot easily disassociate themselves from expressions directed toward them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities in a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms." (462 F.2d at 968-9)

For a prior restraint rule to be valid the Second Circuit in *Shanley, supra*, listed four procedural safeguards it must provide, all of which are contained in the Rule in the case at bar.

In fact, only one court, the Seventh Circuit, has said that prior restraints are wholly inappropriate in high schools. *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355.

Specific Substantive Guidelines of Amended Board Rule

All substantive guidelines except No. 6 and 7 are analyzed in other parts of this Brief. The sixth guideline for prior review of student literature provides:

> "No material shall be distributed which advocates lawlessness or a disregard of school rules."

Although school authorities in Indianapolis, like most school systems, believe that they have the inherent right and duty to counsel and discipline students who urge others to disobey school rules or laws, this power, particularly in the context of a rule of prior review, has seldom been presented to courts as a constitutional question. However, the Board submits that if elementary and high school authorities may constitutionally discipline students for such advocacy at school, it may also be constitutionally prevented.

In *Norton v. Discipline Committee of East Tennessee State University* (6th Cir., 1969), 419 F.2d 195, *cert. den.*, 399 U.S. 906 (1970), the court examined and upheld the authority of a college to suspend students for having distributed literature which was characterized as false, seditious, and inflammatory. The literature in question provided in part as follows:

> "And how has the ETSU student body reacted: Have they precipitated a revolution like French students? No. Have they brought about an entirely new and liberal administration like Polish students? —No. Have they been the forerunners of a new democratic spirit like Czech students?—No. Have they seized buildings and raised havoc until they got what they were entitled to like other American students?—No. What then have the ESTU students done? They have set upon their rears and let the administration crap upon their heads, that's what.
>
> . . .
>
> "Maybe students will get some sense and learn

> that this should cease and that the only way to see that it does is to stand up and fight. . . . Maybe students will learn that no matter what the despots who run this school say, students have the constitutional right to protest, demonstrate, and demand their rights; that women students may not constitutionally be campussed; that students may damned well wear what they want and say what they please. And, maybe just maybe, they will discover that there are student leaders, organizers to rally around so as to assault the bastions of administrative tyranny." (419 F.2d at 197-98.)

The court held that since this literature was calculated to cause disruption of school activities and to ridicule and show contempt for school authorities, the students were properly suspended.

The college students relied principally on *Tinker, supra,* and the fact that no violence or illegal actions followed as a consequence of their distribution of the literature. The Court of Appeals, however, viewed the literature as "an open exhortation to the students to engage in disorderly and destructive activity." (419 F.2d at 198.) The court held that college authorities have the right to nip such action in the bud, as they had done in this instance.

Constitutional protection of expression is, of course, always relative to circumstances, and it makes sense that greater freedom of provocative expression should be allowed on a college campus than in elementary or high schools. College students are older and presumably more mature, and the college campus is a type of community analogous to a town or city. The public grade or high school, on the other hand, is a building in which impressionable adolescents of widely varying backgrounds and abilities are confined and their attendance is mandatory. It stands to reason, therefore, that greater freedom to advocate rule violation or lawlessness would be tolerated constitutionally at the college level than in the lower grades.

In the primary and secondary schools, one reasonable way to nip destructive and disobedient actions in the bud is to prevent children from urging others to commit such acts.

The function of school principals and boards of education is to provide the best possible curriculum and instruction within their means. Time and effort dedicated to the problem of maintaining order should be minimized. That school authorities should spend their time and expend considerable psychological energy making predictions about the likelihood of the disruption consequent to the advocacy of lawlessness or disregard of school rules hardly seems an efficient utilization of resources. In any event, it makes little sense that the first disruption should be allowed. It would seem that the risk to order and an academic atmosphere in the schools, given their special and peculiar sociological problems, outweighs the libertarian interest in expression of this nature. Indeed, it is difficult to perceive any social value in such expression.

The Board's seventh substantive guideline for prior review provides:

> "No material shall be distributed which subjects school administrators and personnel to ridicule. Responsible criticism shall be allowed."

Ridicule or mocking disparagement of school authorities has no place in primary and secondary schools. Arguably, this limitation could be justified under the *Tinker* disruption principle, since mocking disparagement by its very nature interferes with the educational process. Clearly, if ridicule of a teacher or principal could be shown to cause substantial disruption in the school, it could be proscribed under *Tinker*, *supra*. But proof of the causal relationship between ridicule and interference with the educational process would be very time consuming and next to impossible in many cases. Such speech is qualitatively different from the speech in *Tinker* and should not be protected in view

of the special needs and purpose of the elementary and high school.

While student criticism of school policies, teaching methods and competence is salutary and constructive if conducted on a rational level, ridicule or mocking disparagement serves no constructive purpose and may have a deleterious effect upon the atmosphere and operation of the school in many subtle ways. Certainly, its impact upon the classroom effectiveness may be subtle in some cases. It is sometimes said that a teacher's reputation precedes him into the classroom. His effectiveness in the classroom is in large measure a function of student attitudes and expectations which are formed prior to actual exposure to his instruction. If the school tolerates ridicule of a teacher at school, tha teacher may find it virtually impossible to command the respect and attention necessary to properly conduct a class. Courts should be sensitive to the fact that there are serious potential consequences latent in certain types of speech which do not necessarily fall into the category of demonstrable disruption or interference as set forth in *Tinker, supra,* and that such consequences justify limitations upon speech of this kind in the schoolhouse.

Obviously, students are going to talk about their teachers and form attitudes. But to protect mocking disparagement in written form distributed at school to impressionable teenagers is unnecessary and unwise. In balancing the private interest in such speech against the public interest in a sound educational program, the latter far outweighs the former. In the community-at-large, the power of the state to proscribe obscenity is not founded upon a showing by the state that the obscenity has caused, or is likely to cause, some social disorder. It is constitutionally proscribable presumably because conventional wisdom considers it harmful. In any event, as far as obscenity in school is concerned, the *Tinker* standard would appear to be irrele-

vant. The same can be said for ridicule or mocking disparagement of school authorities.

Thus, it is submitted that a "clear and present danger" test with respect to ridicule or advocacy of lawlessness or disregard of school rules is inappropriate for the public school. School authorities should not be placed in a position of having to justify each limitation upon invitations to disorder. The test set forth in *Brandenburg v. Ohio* (1969), 395 U.S. 444, for the community-at-large properly allows for the widest range of social and political expression consistent with the maintenance of an orderly system of government, but the maintenance of an effective and orderly educational institution for minor children does not allow for such latitude in expression.

QUESTION FIVE

Did the Court err in holding that Rule 17(c) of the Federal Rules of Civil Procedure requiring the appointment of an appropriate representative for infants in litigation did not apply where a constitutional question was presented?

This case was brought by a group of minor children and after the Complaint was filed, the defendants filed a petition requesting the Court to appoint a guardian ad litem for the minor plaintiffs in view of their infancy, and also because these minor plaintiffs had filed a class action to represent all of the children in the community in similar situations respecting the Indianapolis schools, who were likewise infants. The District Court ruled that no guardian ad litem need be appointed for infants who present a constitutional issue to the Court. See full text of Court's ruling and reasons therefor at App. 26-28.

It is obvious from the Court's ruling, that the Court made no determination of the adequacy of the representa-

tion of these infant plaintiffs or the infants they purported to represent as a class, but rather ruled that with respect to constitutional questions, the requirements of Rule 17(c) of the Federal Rules of Civil Procedure did not apply. This Rule provides as follows:

> "*Infants or incompetent persons.* Whenever an infant or an incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. *If an infant or incompetent person does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem. The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.*" (Emphasis added)

It is quite clear that Rule 17(c) is not dependent upon the character of the specific claim involved in the litigation. Although Rule 17(c) does not make the appointment of a guardian ad litem for infants mandatory, it does require that the Court give careful consideration to all the circumstances of the particular case and choose between two alternatives: (1) Appoint a guardian ad litem (the usual and preferred choice); or (2) issue such order as will protect the minor. *Roberts v. Ohio Casualty Insurance Co.* (5th Cir., 1968), 256 F.2d 35, indicates a third possibility, *i.e.*, making a judicial determination of the adequacy of present representation. It held that the trial court's failure to at least make a judicial determination that the infant was adequately protected without the appointment of a guardian, was reversible error. The action involved a suit by an insurance company against minor children (and their grandmother) to set aside a workmen's compensation award of death benefits to the minor children. The trial court granted a judgment for the insurance

company, and the mother of the children, the deceased's former wife, as next friend, filed a motion to set aside the judgment on the ground that the Court had not appointed a guardian ad litem to represent the minors. From an order overruling this motion, and from the judgment setting aside the award, the children appealed. In support of its judgment reversing the Court below, the Court of Appeals pointed out that, as shown by the record, no one gave a thought to the appointment of a guardian ad litem until after judgment was rendered below; that this was apparently an oversight; that the discretion lodged in the trial judge by Rule 17(c) was not intended to apply to such a situation; and that the orderly administration of justice and the procedural protection of minors required the trial judge at least to make a factual judicial determination that the infant was already adequately protected before he might dispense with the necessity of appointing a guardian ad litem.

The Court said:

> "But the rule does not mean that a trial judge may ignore or overlook such a fundamental requirement for the protection of infants. We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the court may, after weighing all the circumstances, issue such order as will protect the minor in lieu of appointment of guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the court has considered the matter and made a judicial determination that the infant is protected without a guardian. In *Till v. Hartford Accident and Indemnity Co.* (10th Cir., 1941), 124 F.2d 405, the Court found that a guardian ad litem was not necessary only because the infant was represented through a next friend, the alter-ego of a guardian ad litem. In *Zaro v. Strauss* (5th Cir., 1948), 167 F.2d 218, this Court held that an attorney's repre-

> sentation of an incompetent was insufficient to satisfy the requirements of Rule 17(c)." (256 F.2d at 39)

In the case at bar, the District Court deliberately refused to follow either of the two requirements of the Rule. It also failed to apply the third alternative minimum requirement suggested by the Fifth Circuit in *Roberts, supra, i.e.,* it made no judicial determination that the infants were protected without a guardian. Instead, the Court simply announced a revolutionary new rule of law that infants raising a constitutional question *need no protection.*

The Court believed that Rule 17(c) applied only in cases where money was involved. Yet, even on this point, the District Court's decision was in error, because the minor plaintiffs were seeking both compensatory and punitive damages. By its emphasis upon the nature of the relief sought, a factor not warranted by Rule 17(c), the Court revealed its confusion of the duty of a general guardian and a guardian ad litem. A guardian of an infant is one who legally has the care and management of the person or the estate, or both, of a child, during his minority. *28 C.J. 1058.* But a guardian ad litem is something quite different. He is appointed for the mere temporary duty of protecting the legal rights of an infant in a particular suit and his duties and his office end with that suit. He is not a party in interest in the suit and no property comes into his hands. He has no power nor duty prior to the instituting of the suit or after its determination, except perhaps for the payment of costs. *Blackwell v. Vance Trucking Co.* (E. D., S.C., 1956), 139 F.Supp. 103.

The cases cited by the Court of Appeals can be easily distinguished from the case at bar. In *Rutland v. Sikes* (E.D., S.C., 1962), 203 F.Supp. 276, the Court ruled that because the defendants (a father and his minor son) did not notify the Court of the minority of the defendant at, before or during the trial of the case and because every-

thing was done for the minor by both his father and attorneys, the motion for a new trial by a different attorney for the insurance company would be denied. In *Westcott v. United States Fidelity and Guaranty Co.* (4th Cir., 1946), 158 F.2d 20, there were three defendants, one of whom was a minor. The Court noted that prior to the day of trial no suggestion was made that a guardian ad litem be appointed. The Court held that the failure to grant a last minute motion for a guardian ad litem for the infant defendant was not reversible error because the only reason for this motion was to allow such a guardian to file an answer and demand a jury trial, though counsel for all defendants, including infant, had expressly agreed to a trial without a jury. The Court found that Rule 17(c) was substantially complied with because the Court entered an order directing another lawyer to advise the minor and to protect and defend his interest. In *Till v. Hartford Accident and Indemnity Co.* (10th Cir., 1941), 124 F.2d 405, the Court noted that the minors were represented by next friends and that there is little distinction between a next friend and a guardian ad litem.

The statement by the Court of Appeals that the defendants, having lost the case, do not have a sufficient interest to raise this issue on appeal, is remarkable in view of the fact that in *Roberts, supra,* the judgment was reversed for failure to appoint a guardian ad litem. It should be immaterial that in *Roberts,* it was the minors who sought reversal. Is it to be the rule that if 17(c) is not applied, only infant parties can seek and achieve reversal of the decision? If so, to require adults but not minors to be bound by such a decision constitutes a mockery of justice and violates the equal protection clause of the United States Constitution. It also has a profound effect on other Federal Rules of Civil Procedure such as Rule 55(b)(2), which prohibits entry of a default judgment against an infant or incompetent person by the court unless represented

in the action by a general guardian, committee, conservator, or other such representative who has appeared in the action.

In *Zaro v. Strauss* (5th Cir., 1948), 167 F.2d 218, the appellate court affirmed the setting aside of a default judgment against defendant who had been adjudged insane in another state. No jurisdiction had been obtained over her general guardian and the trial court had not appointed a guardian ad litem to protect her interest. The appellate court said the fact that defendant was represented by counsel before the default was an insufficient basis for concluding that she was "otherwise represented" and therefore, did not satisfy the requirement that a guardian ad litem be appointed for an incompetent person "not otherwise represented."

The decision that if infants raise a constitutional question, the court may ignore the mandate of Rule 17(c), if upheld, will have a profound effect upon litigation in this country. This is due to the fact that children do not have the same capacity as adults to make rational judgments and protect their own interests. It is not difficult to take advantage of and/or use infants, particularly since the taxpayers are now required to finance many lawsuits they may bring.

For reasons set forth above, this case should be reversed.

CONCLUSION

For all of the foregoing reasons, the Petitioners submit that the judgment of the Court of Appeals should be reversed, the injunction of the District Court should be vacated, and each and every Rule considered in this case, including the Board's amended Rule of prior review, should be held constitutional. In addition, Petitioners request that this Court declare the filthy language and cartoons contained in the *Corn Cob Curtain* obscene as to minors, and/or permit the Board to prohibit the distribution of this filthy, indecent material in its elementary and secondary schools even if it is not declared legally obscene as to minors.

Respectfully submitted,

LILA YOUNG
HAROLD H. BREDELL
LAWRENCE MCTURNAN
BREDELL, MARTIN & MCTURNAN
Attorneys for Defendants—Petitioners